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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 115.

THE PUBLIC SERVICE COMMISSION OF PUERTO RICO,
Petitioner,

vs.

HORACE HAVEMEYER, *et al.* (RUSSELL & COMPANY, SUCRS., S. EN C.),
Respondents.

BRIEF FOR RESPONDENTS, HORACE HAVEMEYER, *ET AL.*, AS PARTNERS OF THE CIVIL AGRICULTURAL PARTNERSHIP RUSSELL & COMPANY, SUCESORES, SOCIEDAD EN COMANDITA.

Nature of the Case.

On March 8, 1929 the petitioner, The Public Service Commission of Puerto Rico, made an order (R. 27, 28) purporting to cancel that part of a franchise relating to the use of certain waters of Guanica Lake in Puerto Rico for purposes of irrigation which was granted by the former Executive Council of Puerto Rico on March 19, 1901 and which, so far as concerns the use of said waters, belongs to the respondents.

The respondents appealed from that order to the District Court of San Juan under Section 78 of the Public Service Act of Puerto Rico (Act No. 70, approved Decem-

ber 6, 1917, Laws of Puerto Rico 1917, Vol. II, pages 432-456, of which important parts are printed as an Appendix to the petition of the Commission.) That court on June 4, 1930 rendered judgment (R. 61) dismissing the appeal and affirming the order.

From the judgment of the District Court the respondents appealed to the Supreme Court of Puerto Rico under Section 90 of the Public Service Act of Puerto Rico (printed at page 43 of the Appendix to the petition). That court on November 9, 1933 affirmed the judgment of the District Court (R. 75) with an opinion (R. 64-75).

The respondents further appealed from the judgment of the Supreme Court to the United States Circuit Court of Appeals for the First Circuit under Section 240(a) of the Judicial Code of the United States as amended by the Act of February 13, 1925 (43 Stat. 938). That court on January 10, 1935 reversed the judgment of the Supreme Court and remanded the case for further proceedings not inconsistent with its opinion (R. 80-93).

The Public Service Commission filed with this Court its petition that a writ of certiorari to the Circuit Court of Appeals for the First Circuit be granted, together with a supporting brief. Against the opposition of the respondents, the writ was granted on October 14, 1935.

Opinions Below.

The opinion of the District Court of San Juan (R. 46-61) is not officially reported. The opinion of the Supreme Court of Puerto Rico (R. 64-75) is reported in volume 45, Decisiones de Puerto Rico (Spanish edition), p. 698. It has not yet appeared in the English edition of the Puerto Rico

Reports. The opinion of the Circuit Court of Appeals (R. 80-93) is reported in 74 F. (2nd) 637.

The Questions Presented.

The petitioner's statement of the "questions presented" is as follows (Petition, p. 2):

> "The principal question here involves the scope of the 'judicial power of the United States' under Article III of the Constitution.
>
> Does the judicial power extend to the review by a constitutional court of the United States of the 'reasonableness' of an order of a public service commission repealing a public utility franchise in accordance with a clause in the original franchise accepted by the grantee expressly reserving the power to repeal it, inserted in the franchise pursuant to a requirement of an Act of Congress?
>
> Another question is whether the six individual respondents here,—the appellants in the Circuit Court of Appeals,—are parties in interest entitled to maintain an appeal from the order of the Public Service Commission of Puerto Rico, and particularly to maintain an appeal from the insular Supreme Court to the Circuit Court of Appeals, in the absence of the corporate entity, the *Sociedad en Comandita,* Russell & Co., Sucrs. S. en C., which alone appears to claim any title to the franchise involved."

The Respondents ask that this court also consider the question whether the Public Service Commission had any power or jurisdiction to make the order appealed from. The Respondents have argued in every court that no such power existed, and the recent case of *Langnes* v. *Green,* 282 U. S. 531, 535, seems to permit its consideration here. More-

over, in stating the "reasons for granting the writ," the petitioner seems to admit that the question of "the nature and extent of the powers of the Public Service Commission of Puerto Rico is of very great interest and importance to the people of Puerto Rico and to the Insular Government" (Petition, p. 2).

We show below that the franchise in question was not a "public utility franchise", that the entity of Russell & Company was not a "corporate entity" and that the entity was not absent from the courts below.

Statement of the Case.

Upon the record, as agreed to by the parties (R. 78) only those facts are before the Court which are undisputed or admitted or are found to be facts by the courts below.

Russell & Company, Sucesores, Sociedad en Comandita, is a civil agricultural limited partnership organized under the laws of Puerto Rico and Horace Havemeyer and the other individuals named are all the copartners constituting that partnership. The individuals named appear in this litigation only as partners constituting that partnership (R. 2). The partnership is not and never has been engaged in public service (R. 17) and it is in no sense a public service corporation or a public utility.

The first Organic Act,—the Act of Congress of April 12, 1900 (31 Stat. 77), created, in Sections 18 and 27, the Executive Council as the upper house of the Puerto Rican Legislature, and it provided in Section 32, "that all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the Executive

Council, with the approval of the Governor, and all franchises granted in Porto Rico *shall be reported to Congress, which hereby reserves the power to annul or modify the same*" (Italics ours).

By Section 3 of the Joint Resolution of May 1, 1900 (31 Stat. 715) Congress provided:

> "That all franchises, privileges or concessions granted under section thirty-two of said Act shall provide that the same shall be subject to amendment, alteration or repeal; * * *"

On March 19, 1901, the Executive Council of Puerto Rico granted to the Guanica Land Company, a New Jersey corporation, a private franchise (R. 8 ff.) This was duly approved by the Governor of Puerto Rico and accepted by the grantee.

The Guanica franchise was and is a single franchise; it concerned railroad, dock and use of public waters but it was granted for the single purpose of enabling the Guanica Land Company and its assigns to construct and operate a sugar mill and enterprise, raising canes on their lands, irrigating those lands by the franchise waters, transporting the canes by the franchise railroad to the sugar mill and the sugar to the franchise dock and constructing and operating a franchise dock for the purpose of shipment.

The title is

> "A Form of Franchise to the Guanica Land Company for the Use of Certain Waters for Purposes of Irrigation of its Lands, and also for the Construction of a Wharf in the Harbor of Guanica, and also for the Construction and Operation of a Private Railway Along Certain Portions of the Harbor of Guanica."

Section I authorizes but does not require the construction of a dam at the outlet "for the purpose of retaining, storing and conserving the waters of the said Lake of Guanica, and of restraining and of regulating the flow of the water from said Lake, through the said Cano or otherwise for the purposes hereinafter set forth." It is not claimed that any dam was ever planned or erected.

Section II authorizes the franchise holders to take "such quantity of water not exceeding 20,000,000 gallons during each day as shall be necessary or sufficient for the proper irrigation of the lands now or hereafter owned or leased" by them. The franchise gives no *exclusive* right to take waters. Other abutting owners may, of course, use their riparian rights or other water franchises may be granted.

Section III authorizes the franchise holders to erect "such pumping station, channels and pipe lines as may be necessary or proper for the taking or conveyance of said waters."

Section IV, by way of limitation on I, provides that the franchise shall not be "held or construed to authorize or permit" the franchise holders "to raise or maintain the level of the waters of said lake of Guanica above the customary level thereof during the rainy season, as the same exists in years of average and usual rainfall", and further, that the franchise holders shall bear "all damage sustained by abutting owners by reason of unduly raising the level of the waters of said Lake" and that actions for such damages shall lie against the franchise holders in any court of competent jurisdiction. That "customary level" has never been fixed or determined either by the Government or by the franchise holders (Supreme Court opinion, R. 74).

Section XXI makes clear that the franchise gives no right to use or dispose of the franchise waters except for irrigation of lands owned by the franchise holders for raising their own crops.

Sections V, VI and VII of the franchise authorize the franchise holders to construct, maintain and operate a line of standard gauge railway with proper sidings, switches and other appurtenances upon lands owned or leased by them, lying within six meters of the bank of the Cano Negro or within twenty meters of the shore of the Lake of Guanica or of the Harbor or Bay of Guanica. It is expressly provided that the franchise for the construction, maintenance and operation of the railroad should not give them the right to transport for hire (R. 10).

Sections VIII, IX and X authorize the franchise holders to erect, construct, maintain and operate a dock or wharf in the harbor of Guanica under proper conditions, "of sufficient size and length to allow of its use by steamers and vessels for the purpose of receiving and discharging the goods, chattels and effects of the said Company and its successors and assigns, and for the debarkation and embarkation of its or their officers, agents and employees" (R. 11), but without the right to permit the use of the wharf or dock by steamers or vessels of other persons, firms or corporations or to permit the franchise holders to carry in their own vessels or otherwise goods, chattels or effects belonging to others.

Section XI provides for all kinds of necessary works; Sections XIII and XIV give the right of condemnation for any necessary use; XV provides for acceptance of the franchise as a whole, and Section XVI for a single payment

for all; Sections XVIII, XIX and XX apply to all three parts of the franchise together.

Section XVIII contains the following provision required by the Joint Resolution:

> "In accordance with Section 3 of Public Resolution No. 23, approved May 1, 1900, it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal."

The last Section of the franchise, XXII (R. 14), contains a reservation by the Executive Council of the right at any time to declare the grantee, its successors and assigns, a common carrier with respect to the railroad and wharf and to extend the use of the railroad and wharf to the general public upon such terms and conditions as to rates and tariffs as the Executive Council may from time to time establish.

The water, railroad and dock provisions of the Guanica franchise are closely interlocked and interdependent, and all rights are confined to the group, "said Company and its successors and assigns."

> Under Section I the amount of water to be taken is limited to what is sufficient for the irrigation of the lands owned or leased "by the said Company, or by its successors or assigns, or any of them."
>
> Under Section IV all the group must pay damages to abutting owners for unduly raising or lowering the water level.
>
> Under Section VI, the railroad must be used only for the transportation of cattle, crops and other

goods and effects "owned by the said Company or its successors or assigns" or their agents and employees and it may not transport the crops, etc. "of any other person, firm or corporation for hire."

Under Sections VII and X, the Commissioner of the Interior, in certain cases of road crossings, etc., may incur expenses and charge the cost "against said Company, its successors and assigns as a first lien upon all of its property and assets."

Under Section IX the wharf must be used only for the "goods, chattels and effects of said Company and its successors and assigns" and for its and their officers, agents and employees, and not for other purposes.

Section XVI provides that the Guanica Land Company and its assigns shall pay to the Treasurer "as consideration herefor the sum of three hundred dollars annually" and on default the Commissioner of the Interior may "stop the flow of water from said Lake" or take other steps to enforce the payment—indicating that the operations of the entire group depend upon the flow of water and they all together are interested in making the single annual payment.

Section XXI limits the benefit of the water rights to the group; it provides that nothing in the grant shall give "said Company or its successors, or to the assigns in whole or in part of any of the rights and privileges herein granted, the right, directly or indirectly, with or without compensation in money or otherwise to use, hire, lease, sell or otherwise dispose

of the waters of said lake or any part thereof for the purpose of irrigating any lands *other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold.*"

The Guanica franchise was obviously intended to be, and has, as a matter of fact, been, the basis of a large investment by the franchise holders in lands, railroad, sugar mill and dock, constituting an integrated enterprise of great value to the franchise holders,—and to Puerto Rico.

The interest of Russell & Company in the water rights is stated by the Circuit Court of Appeals as follows: "At some time prior to 1917, the Guanica Land Company assigned the entire franchise to the Guanica Central which afterward assigned it to the Ensenada Estates, Inc., which assigned to Russell & Company that part of the franchise authorizing the taking of 20,000,000 gallons of water daily from Guanica Lake, that is, 'to be more specific, the rights contained under paragraphs I to IV inclusive of said franchise' " (Opinion, R. 83).

The assignment to Russell & Company was made under Section XVII of the franchise, which permits assignment (R. 13), which requires no approval by the Public Service Commission and which does not indicate that the assignment of particular rights under the franchise will split the franchise or transform it into two separate franchises. Russell & Company, after the assignment, was and con-

tinues to be a member of the group designated throughout the franchise as "The Guanica Land Company, its successors and assigns." Of this group, the South Porto Rico Sugar Company is an interested member "apparently having acquired rights under the franchise to the railroad and wharf" (Opinion of the Circuit Court of Appeals, R. 83).

Near the Lake of Guanica is a district of an average level somewhat higher than the bottom of the Lake; this has often been flooded in the past, for instance, in 1914 and 1922 (R. 16) and obviously by reason of frequent floods is commonly called "El Anegado", the flooded region. "Since the month of July, 1926, a great flood began suddenly which covered all of the area known as 'El Anegado' (overflowed region), * * * the water having been kept approximately with that same level since that date, that is, since the middle of the year 1926, during all of the year 1927 till late in the year 1928" (Report of the President of the Public Service Commission forming a part of the order of cancellation, Ex. G, R. 31; also Supreme Court opinion, R. 67).

"There is no evidence of any positive act on the part of the appellant (respondent here) to close Negro pond", the outlet to Guanica Lake (Supreme Court opinion, R. 74). The floods were caused by heavy rains.

On February 27, 1928, the neighboring Municipality of Lajas complained of the floods by resolution (R. 18 ff.); this was the only complaint made. Thereafter the Public Service Commission issued an order to show cause (R. 15 ff.) and other proceedings were taken, as shown by the record (R. 21 to 45). The Respondents made a special appearance and motion to dismiss the case before the Pub-

lic Service Commission (R. 23) and thereafter made answer (R. 24).

Russell & Company and the South Porto Rico Sugar Company took steps to obtain an injunction from the Federal District Court of Puerto Rico against the proposed action of the Commission; this was refused and on appeal the Circuit Court of Appeals, First Circuit, affirmed the decree (28 Fed. (2nd) 820) mainly on the ground that the application was premature, as shown by its opinion which is copied in full in the Supreme Court opinion (R. 68 ff.).

On March 8, 1929, against the opposition of the respondents, the Public Service Commission made an order (R. 27, 28) by which it "orders the cancellation—as it hereby cancels—of that part of the franchise number 5 which refers to the use of certain waters of Guanica Lake for purposes of irrigation." The reasons for this order are given in the Report of the President (R. 28 to 35) which was made a part of the order.

The Report suggests (R. 35) that "if the persons who enjoy at present the right granted by this franchise are interested in using these waters of the lake for purposes of irrigation, there will be no objection to their filing a new petition" with specifications about the water level, and that *"then, after this has been done, the Commission will decide what it may deem convenient."* (Italics ours.) The order (R. 28), after making the cancellation, provided that before it should become effective on June 30, 1929, the "parties in interest are at liberty to file any further petition which they may deem convenient for the use of the waters of Guanica Lake * * *". There was no promise that any new franchise would be granted on any conditions whatever.

From this order of cancellation the respondents took appeal under Section 78 of the Public Service Act of Puerto Rico (Act No. 70 of the Porto Rican Laws of 1917, Vol. II, p. 526) to the District Court of San Juan by petition for appeal (R. 1 ff.). To this the Public Service Commission made answer (R. 36) and on December 17, 1928, the Public Service Commission made an interlocutory order (R. 43).

The District Court of San Juan, by judgment entered on June 4, 1930 (R. 61 ff.), dismissed the appeal and affirmed the order for the reasons stated in its opinion (R. 46 ff.).

The respondents further appealed under Section 90 of the Public Service Act of Puerto Rico to the Supreme Court of Puerto Rico from the District Court judgment; and by judgment of the Supreme Court entered on November 9, 1933 (R. 75) the District Court judgment was affirmed for the reasons embodied in the opinion (R. 64 ff.) which was in effect made a part of the judgment.

The respondents appealed from that judgment to the Circuit Court of Appeals for the First Circuit under the fourth paragraph of Section 128 of the Judicial Code; and by judgment dated January 10, 1935 (R. 93) the Circuit Court reversed the judgment of the Supreme Court and remanded the case for further proceedings not inconsistent with its opinion (R. 80-93).

On April 4, 1935, the Petitioner's time to apply for writ of certiorari was extended (R. 94); and by order filed October 14, 1935, this court granted the petition for a writ of certiorari to the Circuit Court of Appeals (R. 94).

ARGUMENT.

POINT I.

The Circuit Court of Appeals clearly had jurisdiction to decide the controversy presented. The controversy was that presented and decided, judicially, in the two lower courts—whether the order of the Public Service Commission should be affirmed as being "reasonable" and hence valid, or reversed as being "unreasonable" and hence invalid.

"Reasonableness" is a necessary condition of the validity of such an order (1) by the express provision of the Public Service Act of Puerto Rico, and also (2) by the cases holding that amendment or repeal of franchises under a reserved power, must be reasonable, and also (3) by the rule that property taken unreasonably by statute or any governmental action is taken without due process of law.

In deciding that controversy the Puerto Rican Courts and the Circuit Court of Appeals acted judicially; they did not and could not exercise any executive or legislative powers in the premises.

The language of the Circuit Court of Appeals on this point is clearly correct (R. 91, 92).

> "The Public Service Act of Puerto Rico vests no legislative or executive powers in the insular courts under Sec. 85 of the Act. The District Court of San Juan on appeal has no power to change the order of the Commission. If it is not reasonable, or does not conform to the law, or is based on incompetent evidence, it can only reverse, or in its discretion remand,

it to the Commission, which alone has the legislative or executive power to change it. * * *

It is clear, we think, that under the Public Service Act of Puerto Rico, the insular courts on appeal from the Puerto Rican Commission act judicially in determining whether its orders are reasonable, are in conformity with the law, and are based on competent evidence; and the same issues, on appeal from the Supreme Court of Puerto Rico, may be raised in this court."

The Public Service Act, providing for appeal from orders by the Public Service Commission to the District Court of San Juan and for the procedure on such appeals (Act No. 70, Laws of Puerto Rico, 1917, Vol. II, pp. 432-546, important sections of which are printed in Appendix I of the petition for writ of certiorari) shows that the District Court of Puerto Rico must on such appeals act judicially; it has no other power.

On such an appeal the Public Service Commission is brought in as a party defendant and must make answer (Secs. 79 and 82). This negatives the idea that the District Court is an administrative court to correct decisions of the commission.

All such appeals are by petition embodying assignment of errors in the Commission's order, and "upon the filing of an answer by the commission the case shall be considered at issue and a hearing shall be held before said court * * * without further pleadings" (Secs. 78 and 82).

The commission must, upon notification of the appeal, "certify under its official seal to the proper court * * * the record of the said proceedings." Said "record shall include the testimony taken therein, the findings of fact, if any, of

the commission based upon such testimony, a copy of all orders made by the commission in said proceedings, and a copy of the opinion, if any, filed by the commission" (Sec. 79).

"At the hearing of the appeal the said court shall, *upon the record* certified to it by the commission, determine *whether or not the order appealed from is reasonable and in conformity with law*" (Sec. 83; italics ours). No new testimony can be taken by the District Court (Sec. 86) and the fact that the decision must be made "upon the record" certified up shows that the District Court can determine only questions of law and can act only judicially.

The character of the judgment on appeal is determined by the important Section 85:

> "*Decree of Court, How Entered.* If the court shall *upon the record* find that the order appealed from is *reasonable* and in conformity with law, it shall enter a decree dismissing the appeal and affirming the order of the commission. If the court shall, *upon the record,* find that the order appealed from is unreasonable or based upon incompetent evidence materially affecting the determination or order of the commission, or is otherwise not in conformity with law, it may enter a final decree reversing the order of the commission, or, in its discretion, it may remand the record to the commission, *with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law.* In case the said court shall reverse an order of the commission dismissing a complaint, after an investigation and hearing thereon before the commission, it *shall remand* the record and proceedings to the commission, with directions to reinstate the complaint, proceed to another hearing and investigation, and

make such order as shall be reasonable and in conformity with law. In making any final decree on any appeal the court shall have full power to dispose of costs." (Italics ours.)

This Section 85 proves that the District Court on appeal can act only upon the record below, that it can on such an appeal decide no question except whether the order appealed from is (1) unreasonable or (2) based upon incompetent evidence or (3) otherwise not in conformity with law—all of which questions are questions of law. The only judgments possible to the District Court are affirmance or reversal of the Commission's order, or a remand to the Commission "with directions to reconsider the matter and make such order as shall be reasonable and in conformity with law", or in case of the reversal of an order by the Commission dismissing a complaint, a remand of the record to the Commission "with directions to reinstate the complaint, proceed to another hearing and investigation, and make such order as shall be reasonable and in conformity with law". The District Court on appeal has no power or jurisdiction to modify the Commission's order or to direct what order the Commission shall make.

All this is wholly inconsistent with the idea that the District Court is acting as a supervisory body or as an administrative court or that it is exercising any function other than a purely judicial one. "No evidence shall be received at the hearing on any appeal", but if it be shown that additional material evidence has been discovered, the District Court may remand the record to the Commission with directions to take and consider the evidence and "enter and file such order as shall in the opinion of the commission be reasonable and in conformity with law" (Sec. 86).

The District Court cannot decide upon the facts, make any new or different order or exercise any discretion except to send the matter back for reconsideration by the Commission.

In all appeals from the Commission "process shall be served and the practice and rules of evidence shall be the same as in civil actions, except as otherwise * * * provided" in the Public Service Act (Sec. 87). In other words, the District Court sits as a court and not as an administrative body.

"Any party to the record aggrieved by the final judgment, order or decree of the aforesaid court may appeal therefrom to the Supreme Court. Such appeal shall be taken and prosecuted in the same manner and form as is provided in other cases of appeal to the Supreme Court" (Sec. 90).

Reference to Chapter II of Title XII of the Code of Civil Procedure of Puerto Rico, providing for appeals to the Supreme Court from the District Court (being Sections 295 to 306 of the Code and found at pages 139 to 145 of the edition of the Code of Civil Procedure, "Revised and published, under the provisions of Joint Resolution No. 18 of 1930, by the Legislative Joint Commission created by Act No. 50 of 1928"), shows beyond question that the Supreme Court is a true court of appeal acting judicially, that it makes its decision upon the record certified from the lower court, that it hears no evidence and decides no question of fact—and, in short, that it can and does act only judicially.

Obviously the *District Court* acting under this statute upon the record below was required to decide, and did decide, whether as a matter of law the order was to be

upheld as being reasonable or reversed as being unreasonable. Obviously it could exercise, and did exercise, no administrative or legislative power. *It could not modify the order appealed from or direct the Commission what modification to make.*

Again, the *Supreme Court of Puerto Rico* on appeal could, regarding the question of reasonableness, do no more than to determine—judicially—on the record below whether the District Court had erred in—judicially—deciding the controversy and in holding that the order must be upheld as being reasonable. This the Supreme Court well understood; in its opinion (R. 73) it said:

> "The controversy is limited to a determination of whether such decree is reasonable or not and whether it is in accord with the law";

and it concluded that (R. 75):

> "The order or decree of the Commission is reasonable and in accord with the law."

Consequently it affirmed the District Court judgment. Obviously in so adjudging that the District Court had not erred in deciding the controversy, the Supreme Court acted judicially and not in an administrative or legislative way.

Upon appeal from the Supreme Court the *Circuit Court of Appeals* had to decide—judicially—on the record below whether the Supreme Court had erred in deciding—judicially—to affirm the decision of the District Court that the order was to be upheld as reasonable. Obviously in holding, as it did, that the Supreme Court had erred and that its judgment should be reversed, the Circuit Court of Appeals acted judicially. *It could not modify the order or*

direct the Commission how to proceed or what sort of an order to make. It could and did suggest that although the order of cancellation was unreasonable and thus not to be upheld, the Commission might nevertheless be able to make a reasonable order amending the franchise. Its *decision* was to reverse the judgment and strike down the order as invalid because unreasonable.

The decisions of this Court are clear that under such a statute as the Public Service Act of Puerto Rico the action of the Appellate Courts is judicial and not administrative or legislative.

In *Pacific Telephone Company* v. *Kuykendall*, 265 U. S. 196, this court considered in this aspect the character of an appeal to a Washington state court from an order of the Washington Public Service Commission (or Department of Public Works) under a statute strikingly similar to the Puerto Rican statute. This court held that such an appeal was not an administrative remedy and that in deciding such an appeal the Washington court would not "act legislatively". The court says (p. 200):

> "By the statutes of Washington (§10428, Remington's Comp. Stat. 1922), any complainant affected by any order of the Commission (now the Department) may within thirty days apply to the Superior Court of the proper county for a writ of review *'for the purpose of having its reasonableness and lawfulness inquired into and determined.'* The Commission certifies the record upon which the court is to enter judgment affirming or setting aside the Commission's order. If reversed for failing to receive proper evidence offered, the case is to be referred back to the Commission to receive the evidence and enter a new order. The court may remand

> any case reversed by it to the Commission for further action. *It is clear that the function to be performed by the Superior Court under this section is judicial.* It does not fix rates or enter a new order as to them. It does not pass on the sufficiency or weight of evidence. It only looks into the reasonableness and lawfulness of the order of the Commission and is to determine whether evidence which should have been received was rejected, and in that case is to send the case back to the Commission for a new order. *The court does not act legislatively.*" (Italics ours.)

This decision is decisive of our case; it covers the whole ground.

The legislative situation under consideration was almost exactly like ours. In prescribing the character of the appeal from the order of the Washington Commission or Department, the powers and procedure of the Superior Court upon such appeal, and the character of the decision which that court could make and the judgment which it could enter, the Washington statute is similar in every important particular to the Puerto Rican and the criterion of "reasonableness", which so troubles our adversary, is common to both statutes.

When this Court held that the Superior Court in determining the reasonableness and lawfulness of the order appealed from "does not act legislatively" it decided that in entertaining and deciding our appeal from the order of the Puerto Rican Public Service Commission, the District Court of San Juan—and later the Supreme Court and later the Circuit Court of Appeals—did not act legislatively or administratively, but judicially.

The decision is also interesting because in contrast to the *judicial* procedure stated in the above quotation it de-

scribes a different procedure which would be considered *administrative.* For another provision of the Washington statute provided for an appeal to the Superior Court from a valuation order of the Commission or Department; upon such an appeal the statute provided that the Superior Court could inquire into and determine the correctness, reasonableness and lawfulness of findings regarding valuation and *could make new findings and a new valuation.* Regarding such an appeal, with power in the Supreme Court to make new and conclusive findings, this Court says (p. 202):

> "It is clear that the function of the courts in fixing the valuation of the property of the public utility is not confined to a judicial review of the work of the Commission. The courts are made part of the valuation tribunal, pass on the weight of the evidence, and can set aside a valuation and make a new one. *Keller* v. *Potomac Co.,* 261 U. S. 428."

This Court thus made clear the distinction between an *administrative* appeal under the valuation sections and a *judicial* appeal under the reasonable rate section described in the first quotation above.

The same distinction is neatly shown by the opinion of Mr. Justice Roberts in *Porter* v. *Investors Syndicate,* 286 U. S. 461, 468, where the "solely judicial" function of a State court, "to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights" is distinguished from the legislative action of a court which is bound "to examine the evidence presented and either to set aside or to modify the commissioner's order, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final".

In the later case of *Federal Radio Commission* v. *Nelson*, 289 U. S. 266 (May 8, 1933), certiorari to review a judgment of the District of Columbia Court of Appeals, reversing an order by the Radio Commission, this court, against a vigorous challenge of jurisdiction (p. 274) on the same grounds as those pressed in this case, held that as a constitutional court it could consider and decide the appeal. Under the amended statute for appeals from the Radio Commission, the limitation of power in the Commission (the statutory ground for reversal) was *arbitrariness* or *capriciousness;* under the Puerto Rican statute the limitation is *unreasonableness.* As a constitutional court can pass upon one limitation, so it can pass upon the other.

The parallel to our case is so close, the analysis and discussion of law and theory in the exhaustive opinion of Mr. Chief Justice Hughes are so clearly applicable to our case and the conclusions stated are so clearly determinative of our case that we have printed as an Appendix to this brief all that part of the opinion which concerns the jurisdictional questions here involved.

The *Nelson* case is particularly interesting because (as shown by the extract printed in the Appendix) in the prior case of *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, this Court had held that an appeal taken to the District of Columbia Court of Appeals from an order of the Federal Radio Commission under an *earlier* statute was an administrative appeal and the action of the lower court could not be reviewed by this Court as a constitutional court. After that decision, with a view to avoiding the objections thereby raised, the statute providing for such appeals from the Radio Commission was amended so as to eliminate the objections made in the decision of the *General*

Electric case; and in the later *Nelson* case this Court held that an appeal taken under the *amended* statute was judicial and not administrative and that it could be entertained by a Federal constitutional court. The Puerto Rican statute under discussion has none of the objections upheld by the *General Electric* case; it is, on the contrary, in substance similar to the *amended* statute under which the decision in the *Nelson* case held that the appeal was judicial and not administrative.

Clearly, then, an appeal on the record below with power to decide only questions of law and only to reverse or affirm is a judicial appeal and not administrative or legislative. It can make no difference whether the order appealed from was in exercise of a power granted to the Commission by statute or of a power reserved in a franchise grant or ordinance. Our adversary likes to call the reserved power "contractual"; but under a statute providing in effect that *all* orders of the Commission must be reasonable or else be reversed as invalid, there can be no difference or distinction between an order based on the exercise of a "contractual" power (whatever that may mean) or an order based upon a statutory power. Such a distinction is doubtless attractive to our adversary as offering a chance of escape from the logic of the above mentioned cases, but, we submit, it is "a distinction without a difference."

It is interesting that our adversary in his Supplemental Brief for appellees in the Circuit Court of Appeals (here the petitioners) says

> "The franchise is in the nature of a statute. It is a legislative act, by the local body clothed with authority to grant it."

We have shown that the Supreme Court of Puerto Rico in deciding that the order was reasonable and was to be upheld, and not reversed, made a wrong—but judicial—decision of the controversy before it regarding "reasonableness". The order was (as the Circuit Court of Appeals properly held) unreasonable and the Supreme Court judgment upholding it was wrong, and to be reversed, on any one of three grounds:

1. Section 85 of the Puerto Rican Public Service Act directed that unreasonable orders of the Commission should be reversed;

2. The courts have held that amendment or repeal of a franchise under a reserved power must be reasonable and if unreasonable, must, where (as here) the franchise holder is deprived of his property, be held void as being a deprivation of property without due process of law;

3. The general law is that governmental action and orders must be reasonable, and where (as here) the complainant is thereby deprived of property, such unreasonable action or orders are held void by the courts as a deprivation of property without due process of law.

Our discussion above is confined to the first ground; the second and third we shall now discuss. Discussion of all three grounds is certainly proper. The Puerto Rican courts were bound to consider the case in all three aspects and when the Supreme Court gave judgment upholding what the Circuit Court of Appeals has held to be an unreasonable order, it was the right and duty of the latter court, as a constitutional court, to consider whether or not the order was reasonable and when found unreasonable, to

reverse the Supreme Court judgment. The appeal to the Circuit Court of Appeals was taken under Section 128 of the Judicial Code, which provides that

> "Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions * * * in the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved * * *."

This appeal laid the Supreme Court judgment wholly open for review and for reversal on any one or all three of the grounds named. The point that the order takes property without due process of law has been stressed from the beginning, as we show at page 39 below.

Apart from any statute it has often been held in the Federal courts that an amendment or repeal of a franchise under a reserved power must be reasonable. Federal constitutional courts often take jurisdiction to determine—judicially—whether the amendment or repeal is unreasonable or arbitrary and if so, to hold it invalid as depriving the franchise holder of its property without due process of law.

The following cases lay down the rule above stated and show that the Circuit Court of Appeals as a constitutional court properly took jurisdiction to protect the franchise holder from deprivation of property without due process of law.

Chicago, M. & St. P. R. R. v. *Wisconsin*, 238 U. S. 491, 501, a case regarding sleeping cars, where this court held that "the reserved right of altering and amending the charter of a corporation does not confer mere *arbitrary*

power or authorize the taking of the corporation's property without compensation" (Headnote; italics ours) and decided that a statute of Wisconsin purporting to regulate pullman cars was unconstitutional because it was arbitrary and took property without compensation, and that it could not be supported as an exercise of reserved power to amend a charter. The court said:

> "In the brief of counsel for the State it is argued that the statute can be sustained as a valid exercise of the State's reserved power to alter the charter of the Company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed such a ruling would seem to have been opposed to *State ex rel. Northern Pacific* v. *R. R. Commission*, 140 Wisconsin, 157, and the *Water Power Cases*, 148 Wisconsin, 124, where it was held that the right to amend a charter does not authorize the taking of the Company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court."

Stearns v. *Minnesota*, 179 U. S. 223, 259, where it was held that a statute altering a prior contract relating to taxation of the railroads was void because impairing the obligation of the contract, even though there was a reserved power to amend or repeal. Mr. Justice WHITE in his concurring opinion stated the rule:

> "* * * it has also been equally determined that *the reserved right to repeal, alter or amend does not confer mere arbitrary power*, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law." (Italics ours.)

In *Shields* v. *Ohio,* 95 U. S. 319, 324, this Court undertook to decide whether or not a statute of the State of Ohio fixing rates upon a certain railroad was valid where the charter provided that the railroad might itself fix such rates as it deemed reasonable. The court held that under the reserved power to amend such charter this was a reasonable amendment and valid, saying:

> "The power of alteration and amendment is not without limit. *The alterations must be reasonable;* they must be made in good faith, and be consistent with the scope and object of the act of incorporation. *Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.* Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases." (Italics ours.)

Sinking Fund Cases, 99 U. S. 700, 720. The court in this case considered and upheld an amendment of the charter of a railroad, made under a reserved power to "alter, amend, or repeal," saying:

> "• • • Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made."

Looker v. *Maynard,* 179 U. S. 46, 52. This was a *quo warranto* proceeding in the courts of Michigan brought to

the United States Supreme Court on writ of error. The Supreme Court upheld, under the reserved power, an amendment allowing cumulative voting for directors where such voting was not permitted by the original charter. With respect to the reserved power to alter, amend or repeal, the court said:

> "*The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted,* is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, *which will not defeat or substantially impair the object of the grant or any right vested under the grant,* and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs." (Italics ours.)

Stanislaus County v. *San Joaquin C. & I. Co.*, 192 U. S. 201, 213, cited many United States Supreme Court cases. This was a case of the right of a canal and irrigation company to fix rates for water supply, alleged to be a contract because contained in the charter. The court upheld, after full consideration, the action of the County authorities in fixing rates, one of the grounds being that under the reserved power the charter could be amended so as to fix "reasonable" rates, saying in respect to such power:

> "* * * there is a limitation, even to the power of amendment when reserved in the constitution or a statute of a State. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is

> not without limit; that the alterations must be *reasonably made, in good faith* and consistent with the scope and object of the act of incorporation, and that *sheer oppression and wrong could not be inflicted under the guise of amendment or alteration;* that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases is surrounded by the same sanction and are as inviolable as in other cases." (Italics ours.)

Fair Haven R. R. Co. v. *New Haven,* 203 U. S. 379, 388, where the court after full consideration upheld an assessment for paving between railroad tracks, finding it a proper exercise of the reserved power to amend the charter, saying:

> "The limitation upon the power of amendment of charters of corporations has been defined by this court several times. It is said in one case that such power may be exercised to make any alteration or amendment in a charter granted that will not defeat or substantially impair the object of the grant or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter. *Holyoke* v. *Lyman,* 15 Wall. 500, 522."

Owensboro v. *Cumberland Tel. Co.,* 230 U. S. 58, 74, where this Court held void an ordinance purporting to repeal an ordinance granting a telephone franchise although the franchise-ordinance provided that it might be "altered or amended as the necessities of the city may demand" and the city charter gave it power "to make, publish and repeal ordinances."

The petitioner argues that the Commission's order of partial cancellation was a repeal and not an amendment. There can be no sound distinction between the two for the purposes of this rule, but we submit that cancellation of the water rights was in nature and effect an amendment of the entire integrated franchise within the meaning of the authorities quoted.

We have shown above that the franchise, although providing for water rights and railroad and dock, was nevertheless closely integrated into a single franchise which could only be held and enjoyed by a limited group, "the Guanica Land Company and its successors and assigns". It was obviously granted for the single purpose of enabling the "Guanica Land Company, its successors and assigns" to construct and operate an important sugar enterprise, raising sugar cane on the land, irrigating the lands by water, transporting canes and supplies and the sugar by railroad and constructing and operating a franchise dock for shipment. Any cancellation or repeal of a part of such an integrated franchise is necessarily a modification of the franchise, especially if the basic right to take irrigation water is cancelled. Thus the order cancelling the water rights (four sections out of a franchise containing twenty-two, one of three parts of this closely integrated franchise) is an "amendment" within the rule stated by the authorities above cited—that the amendment of a franchise must be reasonable and consistent with its character and purpose.

Moreover, as we have shown at pages 8 to 11 above, all parts of the franchise are so closely interwoven and interdependent that the water rights cannot be cancelled without deranging the other parts of the franchise and materially altering the whole. One leg of a tripod cannot

be destroyed or even moved without damaging the whole machine.

It is not really material to consider whether the cancellation order was amendment or repeal; there can be no sound distinction for this purpose between the two, and in either case the authorities cited above show that the action must be reasonable.

Again, and quite apart from the Puerto Rican Public Service Act, the rule is broad in American jurisprudence that governmental powers must be exercised "reasonably"; and that Federal constitutional courts will hold void any unreasonable exercise thereof when constitutional rights are involved.

This jurisdiction Federal constitutional courts continually take. The cases where the rule is laid down and Federal courts have exercised jurisdiction to protect constitutional rights are so numerous that it is hard to select, but we may mention a few typical cases.

The *general principle* that all governmental power, under our system, must be reasonably exercised, and that government may not be arbitrary and capricious has been often emphatically asserted by this court, as in the two leading cases of *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369, 370, and *Hurtado* v. *California,* 110 U. S. 516, 535, 536.

The police power, the power to make regulations of all kinds to promote the public welfare, and one of the broadest and most important powers of government, must be exercised reasonably.

Nebbia v. *New York,* 291 U. S. 502. This case involved, and this court decided upon and upheld the validity of a

State statute regulating the milk business, fixing prices, etc. In the course of its discussion of the police power, the Court, by Mr. Chief Justice HUGHES, said, at page 525:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. *And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious,* and that the means selected shall have a real and substantial relation to the object sought to be attained." (Italics ours.)

See also *Chicago etc. Ry.* v. *Drainage Comm.*, 200 U. S. 561, 592; *Nashville etc. R. R.* v. *Walters*, 294 U. S. 405, 414 (March 4, 1935); *Panhandle Co.* v. *Highway Comm.*, 294 U. S. 613, 622 (April 1, 1935); *Atlantic Coast Line* v. *Corporation Comm.*, 206 U. S. 1, 20.

Powers which have been delegated to or conferred on commissions, etc.; must be reasonably exercised even though this requirement is not included in the act creating the Commission.

Interstate Com. Comm. v. *Louisville, etc. R. R.*, 227 U. S. 88. In this case an order of the Interstate Commerce Commission fixing rates was upheld. In reaching its decision this Court examined the record to find whether there was evidence to sustain the order and whether under the facts shown the order was reasonable. It was argued that the statutes did not require that an order of the Interstate

Commerce Commission should be based upon substantial supporting evidence. The Court said, at page 91:

> "And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and *capriciously make findings by administrative fiat.* Such authority, however beneficently exercised in one case, could be injuriously exerted in another; *is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.*" (Referring to the due process clause; italics ours.)

United States v. *Chicago, etc. R. R.*, 282 U. S. 311, 324. Here, in declaring void an order of the Interstate Commerce Commission, the Court said that a power conferred on the Interstate Commerce Commission "is not unlimited and may not be exercised arbitrarily."

The requirements of reasonableness and the rule that governmental action may not be arbitrary or capricious is often applied in the cases dealing with the *power to fix rates* of common carriers and other public service corporations.

Reagan v. *Farmers' L. & T. Co.*, 154 U. S. 362, 399, where the court went extensively into the evidence and on the evidence held void certain rates fixed by the Texas Railroad Commission, saying:

> "This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a govern-

> ment, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. *It was, therefore, within the competency of the Circuit Court of the United States* for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, *to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission.*" (Italics ours.)

See also *Chicago, etc., Ry.* v. *Wellman,* 143 U. S. 339, 344; *St. Louis, etc., Ry.* v. *Gill,* 156 U. S. 649, 657.

The due process clause in the Fifth and Fourteenth Amendments, repeated in Section 2 of the Puerto Rican Organic Act (39 Stat. 951), requires that all exercises of governmental power must be reasonable, bear a real and substantial relation to the public welfare and be in accord with fundamental principles of liberty and justice.

Chicago, etc., Ry. v. *United States,* 284 U. S. 80, 97. In this case the Supreme Court passed upon and held invalid certain car hire regulations made by the Interstate Commerce Commission, and said:

> "The use of railroad property is subject to public regulation, but *a regulation which is so arbitrary and unreasonable* as to become an infringement upon the right of ownership *constitutes a violation of the due process of law clause* of the Fifth Amendment. *Atlantic Coast Line* v. *No. Carolina Corporation Comm.,* 206 U. S. 1, 20. And certainly a regulation permitting the free use of property in the

face of an express finding that the owner is entitled to compensation for such use cannot be regarded otherwise than as *arbitrary and unreasonable.*" (Italics ours.)

Atchison, etc. Ry. v. *Railroad Comm.*, 283 U. S. 380. The California Railroad Commission had issued an order requiring certain railroads to construct a Union Station in the City of Los Angeles. The Court considered the question of the reasonableness of this order and upheld it, saying per Mr. Chief Justice HUGHES, at page 395:

> "* * * But the power to regulate is not unlimited. '*It may not unnecessarily or arbitrarily trammel or interfere* with the operation and conduct of railroad properties and business.' *Norfolk & Western Ry. Co.* v. *Public Service Comm.* 265 U. S. 70, 74; *Mississippi Railroad Comm.* v. *Mobile & Ohio R. Co. supra. The question in each case is whether,* in the light of the facts disclosed, *the regulation is essentially an unreasonable one.*" (Italics ours.)

Reinman v. *Little Rock*, 237 U. S. 171. The City of Little Rock had passed an ordinance forbidding the conducting of the business of a livery stable in certain portions of the City. The Court said, in respect to the ordinance itself, that it was enacted "under authority delegated by the legislature" and was "a state law within the meaning of the Federal Constitution * * * and within the meaning of the Judicial Code, Section 237, which confers jurisdiction upon this court." In considering and upholding the validity of this ordinance, the Court said, at page 177:

> "While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the

> law-making power; and so long as the regulation in question is not shown to be clearly *unreasonable and arbitrary,* and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been *arbitrarily* selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment." (Italics ours.)

Mooney v. *Holohan,* 294 U. S. 103, 112. The Court considered whether certain criminal procedure in a State court was due process of law, and, in regard to the requirement of due process, said:

> "That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the *fundamental conceptions of justice which lie at the base of our civil and political institutions. Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317. (Italics ours.)

See also *Chicago etc. R. R.* v. *Chicago,* 166 U. S. 226, 240; *Murray's Lessee* v. *Hoboken etc. Co.,* 18 How. 272, 276; *Powell* v. *Alabama,* 287 U. S. 45, 65.

There can be no doubt that the order appealed from deprived Russell & Company of property and that—being unreasonable—it deprived it of property without due process of law contrary to Section 2 of the Puerto Rico Organic Act of 1917. It was properly held void by the Circuit Court of Appeals.

We have referred above to cases establishing the rule that where property is taken by unreasonable governmental act, it is taken without due process of law.

It will not be denied that the Public Service Commission in making the cancellation order purported to act in its governmental capacity; that its order, for the purpose of consideration of due process of law, is to be treated as governmental action; that Russell & Company was by the order (if it be held valid) deprived of property; that if the governmental action was unreasonable, this deprivation of property would be without due process of law and would thus be contrary to the Organic Act of Puerto Rico; and that Federal constitutional courts have jurisdiction to inquire into the reasonableness of such governmental action and to hold that action void if unreasonable as taking property without due process of law. The provision of Section 2 of the Organic Act of 1917 (39 Stat. 951) is and was on the date of the cancellation order—

> "That no law shall be enacted in Puerto Rico which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws."

The water franchise is, of course, property (*Frost* v. *Corporation Commission,* 278 U. S. 509, 519, 520; *Owensboro* v. *Cumberland Tel. Co.,* 230 U. S. 58, 64); and giving, as it did, the right to use for irrigation 20,000,000 gallons of water daily, it was property of great value. Moreover, as shown by paragraph IV of Russell & Company's answer to the order to show cause of the Public Service Commission (R. 26):

> "* * * In accordance with the provisions of said franchise, this partnership and the former owners of the franchise have spent great sums of money in pipes, pumps, canals and other works for taking and using the water of Guanica Lake, and that the can-

> cellation of said franchise would cause to this partnership a great loss of money and property."

And again at page 7 of the Petition for Certiorari it is admitted that Russell & Company and its predecessors "have taken the 20,000,000 gallons a day of water from the lake to irrigate their lands"—and this Court will take judicial notice that it is a very large agricultural enterprise which will use 20,000,000 gallons of water daily for irrigation.

From the beginning and at every stage of this litigation Russell & Company has pressed the point that the cancellation order deprived it of property without due process of law. In the respondent's answer to the Commission's order to show cause, paragraph IV (R. 26), it was alleged that cancellation of the franchise

> "would be equivalent to the taking of the property of this partnership without due process of law * * * and will be contrary to the fifth and fourteenth amendments of the Constitution of the United States and to the Organic Act of Puerto Rico * * *."

And again in the assignment of errors on its appeal from the order of the Public Service Commission the respondent alleged that the order

> "constitutes a taking of the property of the appellants (respondents here) without due process of law * * *" (R. 7).

It seems clear, then, that the lower courts and the Circuit Court of Appeals were deciding *judicially* whether the order should be upheld as being reasonable or should be reversed as being unreasonable. Not in any sense or

to any extent were these courts deciding the question of "its wisdom from an administrative point of view"; it is not true in any sense that the question before the court was "merely a question of the wisdom of the executive authority in exercising administrative powers admittedly within its province."

Our adversary's discussion of the franchise holder's consent to the terms of the franchise (Petitioner's Reply Brief, pp. 7, 8) is, we submit, wholly irrelevant.

This matter was not mentioned in the petition for the writ; it appears for the first time in the *reply* brief.

We have no quarrel with the time honored maxim "*consensus facit jus*", but what application has it here? If, as we have tried to show above, the law and also, properly construed, Section XVIII of the franchise provides that the reserved power to amend and repeal cannot be exercised unreasonably, it is of no possible importance that the franchise holder consented to the franchise—or if on the other hand, as we strenuously deny, the law and the franchise provide that the reserve power *can* be exercised unreasonably, there is no relevance or appropriateness in discussing the consent of the franchise holder.

If its consent were in question, it is obvious: First, that the Guanica Land Company would not have dreamed of accepting the franchise unless it had believed and expected that the governmental authorities empowered to exercise the reserved power to amend or repeal the franchise would exercise it reasonably; and second, that under the law and the court decisions referred to above this belief was wholly justified.

We might well paraphrase the language of Mr. Justice McReynolds in *Northern Ohio Trade Co.* v. *Akron,* 245 U. S. 574, 585:

> "The circumstances surrounding the grant of 1892 show no intention either to give or accept a mere revocable right. It would be against common experience to conclude that rational men wittingly invested large sums of money in building a railroad subject to destruction at any moment by mere resolution of county commissioners. *Detroit* v. *Detroit Citizens' Street Ry. Co.,* 184 U. S. 368, 384."

POINT II.

In permitting himself to discuss the question whether the order was on the record, actually unreasonable (Petitioner's Brief, pp. 26-28) our adversary has ignored the rule that on review in *certiorari* "the only question for consideration is that stated in the petition for the writ of *certiorari*."

This rule was so stated in *Helvering* v. *Taylor*, 293 U. S. 507, 511.

See, to the same effect, *Clark* v. *Williard*, 294 U. S. 211, 216; *Zellerbach Company* v. *Helvering*, 293 U. S. 172, 182; *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Davis* v. *Currie*, 266 U. S. 182; *Webster Company* v. *Splitdorf Company*, 264 U. S. 463.

The writ of certiorari was here sought on the ground that there is no "controversy" which the Circuit Court of Appeals had jurisdiction to decide—not on the ground that the Court erred in deciding that the order should be reversed because arbitrary and unreasonable. In stating (Petition, p. 20) its "reasons for granting the writ" the petitioner makes clear that the writ is not sought to review a mistake of the Circuit Court of Appeals as to reasonableness but only to determine definitely the "scope of the judicial powers of the United States and of the power of a constitutional court of the United States to review the action of the public service commission" etc. The petitioner's statement of "questions presented" (Petition, p. 2, repeated by reference at petitioner's brief, p. 22) is to the same effect, with the additional mention of parties.

"The principal question here involves the scope of the 'judicial power of the United States' under Article III of the Constitution.

Does the judicial power extend to the review by a constitutional court of the United States of the 'reasonableness' of an order of a public service commission repealing a public utility franchise in accordance with a clause in the original franchise accepted by the grantee expressly reserving the power to repeal it, inserted in the franchise pursuant to a requirement of an Act of Congress?

Another question is whether the six individual respondents here,—the appellants in the Circuit Court of Appeals,—are parties in interest entitled to maintain an appeal from the order of the Public Service Commission of Puerto Rico, and particularly to maintain an appeal from the insular Supréme Court to the Circuit Court of Appeals, in the absence of the corporate entity, the *Sociedad en Comandita,* Russell & Co., Sucrs. S. en C., which alone appears to claim any title to the franchise involved."

We believe that we have shown above that the Circuit Court of Appeals *within its jurisdiction* decided that the Supreme Court of Puerto Rico erred in holding that the order was to be upheld as being reasonable; in its opinion (R. 92) the Circuit Court of Appeals clearly stated its decision on that point. As to reasonableness this decision was for all purposes of this review conclusive. See the last part of the quotation from *Cami* v. *Central Victoria, Ltd.,* 268 U. S. 469, set forth at page 45 below.

POINT III.

No question of "local law" is here involved.

This is proved by the Supreme Court opinion (R. 73) and the Circuit Court of Appeals opinion (R. 91). Each opinion shows that the Court did not consider or decide upon any question of local law but did decide on what each Court considered to be general principles, not peculiar in any way to Puerto Rico.

The construction of Acts of Congress and of the franchise (which is, after all, a document *carefully drawn in English*) is certainly not a matter of local law, nor is the determination of the reasonableness of the Commission's order, in view of the facts found or admitted.

Each of the cases of local law cited by counsel for the petitioner at page 29 of his brief concern some clear matter of local law or procedure, such as the Puerto Rican law of waters, very different from the American, or the construction of tax provisions of the Political Code of Puerto Rico, or the Spanish Law of prescription, or the effect of the Puerto Rican mortgage law, or the liability of one signing a note under the Puerto Rican Civil Code, or the Philippine Civil Code governing parental authority.

Properly understood, the rule of respect for local law *can* have no application in this case—as will, we think, appear from the following recent statements of that rule by this Court. *Cami* v. *Central Victoria, Ltd.*, 268 U. S. 469, was a case which involved a tax ordinance of a Puerto Rico municipality and the tax was attacked on the ground that the ordinance was void. The Circuit Court of Appeals for the First Circuit reversed the judgment of the Supreme

Court of Puerto Rico upholding the tax. The Supreme Court of the United States *affirmed* the judgment of the Circuit Court of Appeals which reversed the Puerto Rican Supreme Court. The court, per Mr. Justice Holmes, said, at page 470:

> "*Had the Circuit Court of Appeals deferred to the local interpretation of Porto Rican statutes, we should not have granted a writ.* We repeatedly have stated the reason for such deference, and we believe that the appellate jurisdiction was granted with other ends in view than that of setting the local courts right in their interpretation of their own laws. *But since the case has been decided the other way we cannot avoid dealing with the merits* and we should not be warranted in reversing the decision under review unless we thought either that it was wrong or at least that there was such plausible ground for the judgment reversed by it, that the local decision ought not to be disturbed." (Italics ours.)

Yu Cong Eng v. *Trinidad,* 271 U. S. 500, 522, a review of a judgment of the Philippine Supreme Court which denied a petition for a writ of prohibition to prevent the enforcement of a Philippine Act making it an offence to keep business books of account in any language except English, Spanish or Filipino. The Court held the law to be invalid. Mr. Chief Justice Taft said, pages 522, 523:

> "The suggestion has been made in argument that we should accept the construction put upon a statute of the Philippine Islands by their Supreme Court, as we would the construction of a state court in passing upon the federal constitutionality of a state statute. The analogy is not complete. The Philippines are within the exclusive jurisdiction of the

United States Government, with complete power of legislation in Congress over them; and *when the interpretation of a Philippine statute comes before us for review, we may, if there be need therefor, re-examine it for ourselves as the court of last resort on such a question.* It is very true that, with respect to questions turning on questions of local law, or those properly affected by custom inherited from the centuries of Spanish control, we defer much to the judgment of the Philippine or Porto Rican courts. *Cami* v. *Central Victoria, Ltd.* 268 U. S. 469; *Diaz* v. *Gonzales,* 261 U. S. 102. But *on questions of statutory construction,* as of the Philippine Code of Procedure adopted by the United States Philippine Commission, *this Court may exercise an independent judgment.* * * *

"*The question of applying American constitutional limitations to a Philippine or Porto Rican statute dealing with the rights of persons living under the government established by the United States, is not a local one,* especially when the persons affected are subjects of another sovereignty with which the United States has made a treaty promising to make every effort to protect their rights. The fundamental law we administer in the Philippine bill of rights was a marked change from that which prevailed in the Islands before we took them over, and is to be enforced in the light of the construction by this Court of such limitations as it has recognized them since the foundation of our own government. In its application here, we must determine for ourselves the necessary meaning of a statute officially enacted in English, and its conformity with fundamental limitations." (Italics ours.)

Philippine Sugar &c. v. *Phil. Islands,* 247 U. S. 385, 390, Mr. Justice Brandeis writing, overruled the construction of a Philippine statute by the Philippine Supreme Court.

> "It is also urged that, since the construction of §285 is a matter of purely local concern, we should not disturb the decision of the Supreme Court of the Philippine Islands. This court is always disposed to accept the construction which the highest court of a territory or possession has placed upon a local statute. *Phoenix Ry. Co.* v. *Landis,* 231 U. S. 578. But that disposition may not be yielded to, where the lower court has clearly erred. *Carrington* v. *United States,* 208 U. S. 1. Here, the construction adopted was rested upon a clearly erroneous assumption as to an established rule of equity. The Supreme Court erred in refusing to consider the evidence of mutual mistake; and its judgment must be reversed."

Again we must say that we do not see why the question of "local law" should be here discussed. The Circuit Court of Appeals has *within its jurisdiction* decided that the judgment of the Supreme Court of Puerto Rico should be reversed, and the writ of certiorari is sought on the ground that there is no "controversy" which the Circuit Court of Appeals had jurisdiction to decide—not on the ground that the Court erred with regard to any local Puerto Rican law or question. As we show under Point II above, the petitioner makes it clear (Petition, p. 20) that the writ is sought only to determine definitively "the scope of the judicial power of the United States and of the power of a constitutional court of the United States to review the action of the public service commission," etc., and at page 2 of the Petition it states as the only questions presented that question and the question of parties.

POINT IV.

The appeal to the Circuit Court of Appeals was properly taken by the partnership "Russell & Company, Sucrs., S. en C.," the owner of that part of the integrated Guanica franchise which refers to the use of waters; and the partnership entity was properly before that Court.

As we understand it, the claim of the petitioner in this Court is that the partnership entity did not appeal to or appear in the Circuit Court of Appeals and was not subject to its judgment.

Why not?

At the risk of prolixity, it may be helpful to note how the partnership Russell & Company, Sucesores, S. en C., has appeared and participated, and from time to time appealed in this litigation. The facts are as follows:

The special appearance before the Public Service Commission was made by "Russell & Company, Sucrs., S. en C., a civil, agricultural partnership composed of Horace Havemeyer, Frank M. Welty, Frank A. Dillingham, Edwin L. Arnold and H. B. Orde, as partners" (R. 23, 24).

The answer to the order to show cause (dated November 21, 1928) of the Public Service Commission began:

> "Now comes Russell & Company, Sucrs., S. en C., a civil, agricultural partnership organized in accordance with the laws of Puerto Rico, composed of Horace Havemeyer, Frank A. Dillingham, Frank M. Welty, Edwin L. Arnold and H. B. Orde, as partners," etc. (R. 24).

The caption of the petition for appeal from the Commission's order to the District Court of San Juan named the appellants as follows:

> "HORACE HAVEMEYER, et al., as Partners of the Civil, Agricultural Partnership Russell & Co., Sucrs., S. en C., Appellants" (R. 1),

and the petition began:

> "Now come Horace Havemeyer, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, members of the civil, agricultural partnership of Puerto Rico, Russell & Co., Sucrs., S. en C., and hereby appeal" etc. (R. 1).

The petition alleges that the persons named, "the appellants herein, are the sole members of said partnership and that as such members the said appellants are the owners" etc. (R. 2).

The "Statement of the Case and Opinion" of the District Court for San Juan, dated June 4, 1930, upon the appeal from the order of the Commission names the plaintiffs as

> "HORACE HAVEMEYER, FRANK A. DILLINGHAM, EDWARD S. PAINE, Edwin L. Arnold, Frank M. Welty and Henry B. Orde, as Partners of the Civil, Agricultural Partnership Russell & Company, Sucrs., S. en C., Plaintiffs" (R. 46),

and this Statement by the District Court says that

> "the appellants, as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C., allege that they are the actual holders of said franchise" (R. 47),

and further, that an appeal from the order of the Commission was taken

> "by Horace Havemeyer et als., as partners of the civil agricultural partnership Russell & Company, Sucrs., S. en C." (R. 49).

The judgment in the District Court of San Juan stated that

> "the appellants, Horace Havemeyer, Frank M. Welty, Frank A. Dillingham, Edward S. Paine, Edwin L. Arnold and Henry B. Orde, as partners of the civil agricultural partnership, Russell & Co., Sucrs., S. en C., appeared by their counsel," etc. (R. 61).

The opinion of the Supreme Court, dated November 9, 1933, shows as the title

> "HORACE HAVEMEYER et als., Plaintiffs-Appellants,"

and states that

> "the civil agricultural partnership Russell & Company, Sucrs., S. en C., by its partners Horace Havemeyer and others, as grantee of certain rights which the Guanica Land Company had in a franchise, appealed to the District Court of San Juan from a decree of the Public Service Commission of Puerto Rico," etc., and that "Russell & Company appealed from that judgment to this Court" (R. 64, 65).

We have shown fully above the procedure used up to the time of the appeal to the Circuit Court of Appeals. Throughout, this civil agricultural partnership has appeared before the Commission and has appealed to and appeared in the District Court of San Juan and the Su-

preme Court of Puerto Rico by its partners—as such a partnership should. And those courts have fully recognized that the partnership, as a result of such procedure, was properly before them and bound by their judgments.

This our adversary does not and, we believe, cannot deny.

The procedure used by Russell & Company, Sucrs., S. en C., in its appeal to the Circuit Court of Appeals and in its appearance in that Court was exactly the same as the procedure used in the lower courts—to the full satisfaction of those courts; the partnership on the appeal acted by its partners in the same way and with the same result—that the partnership entity was present in the Circuit Court of Appeals and was bound by its judgment. The procedure, in detail, was as follows:

The Assignment of Errors in the appeal to the Circuit Court of Appeals, dated December 18, 1933 (R. 75) begins:

> "Now come the plaintiffs-appellants herein, Horace Havemeyer, Frank A. Dillingham et al., as partners of the agricultural civil partnership Russell & Co., Sucrs., S. en C."

The caption of the citation on appeal, issued January 2, 1934, shows the plaintiffs-appellants to be

> "Horace Havemeyer et al., as partners of the Civil Agricultural partnership of Russell & Company, Sucrs., S. en C."

and the citation cites the Public Service Commission to appear before the Circuit Court of Appeals

> "pursuant to an appeal filed in the office of the Secretary-Reporter of the Supreme Court of Puerto

> Rico in a certain cause lately pending in said Court wherein Horace Havemeyer, Frank A. Dillingham, et al., as partners of the civil agricultural partnership Russell & Company, Sucrs. S. en C. are plaintiffs-appellants," etc.

The caption of the stipulation as to the record on appeal to the Circuit Court of Appeals, dated January 9, 1934 (R. 78) names the appellants as

> "HORACE HAVEMEYER ET AL., as partners of the Civil Agricultural partnership RUSSEL & Co. SUCRS. S. EN C."

This stipulation was signed (R. 79) on behalf of the Public Service Commission by the Attorney-General of Puerto Rico and the Assistant Attorney-General and the order of the Chief Justice of the Supreme Court of Puerto Rico, approving that stipulation, was apparently endorsed at the foot of the stipulation (R. 79).

The caption of the order of enlargement of time for docketing the case in the Circuit Court of Appeals (R. 80) named the appellants as

> "HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs. S. en C.), Appellants."

> NOTE: The matters above quoted from the citation on appeal, the stipulation and order of enlargement are not printed in the record, but we shall present at the hearing a certificate of the Clerk of the Circuit Court of Appeals for the First Circuit showing the form of these captions.

The caption of the Opinion of the Circuit Court of Appeals filed January 10, 1935 (R. 80) names the appellants as

"HORACE HAVEMEYER et al. (Russell & Co., Sucrs., S. en C.), Appellants"

and in overruling the contention of our adversary that Russell & Co., Sucrs., S. en C., a civil agricultural partnership, was not a party to the appeal, the Court said (R. 81):

"The order to show cause was issued to 'Russell & Company, S en C, a limited partnership.' That company is here."

The caption of the judgment of the Circuit Court of Appeals, dated January 10, 1935 (R. 93) named the appellants as

"HORACE HAVEMEYER ET AL. (Russell & Co., Sucrs. S. en C.), Appellants."

NOTE: This caption is not printed in the record, but we shall present at the hearing a certificate of the Clerk of the Circuit Court of Appeals for the First Circuit showing the form of this caption.

The order in this Court extending the time within which to apply for writ of certiorari, which was obtained by the petitioner on April 4, 1935, carries the following caption:

"Horace Havemeyer, et al. (Russell & Company, Sucrs., S. en C.), Respondents *v.* Public Service Commission of Puerto Rico, et al., Petitioners."

NOTE: The caption of the last mentioned order is not printed in the record, but the caption appears on the order on file in this Court.

From the foregoing review of procedure, we believe that we have established that:

The Courts in Puerto Rico, who well understood the character of the partnership entity and the way in which such an entity should act in litigation, considered and stated that the appeals and appearances were proper and that the partnership entity was present in their courts; no motion to dismiss was made for lack of a necessary party;

If it be a question of local law how such an entity should be named in the courts and in court papers, the Puerto Rican courts have shown their view upon such local law;

The procedure used throughout, both in the Puerto Rican courts and in the Circuit Court of Appeals, was sensible and could not mislead; the names used to describe the entity were clear and could not be misunderstood;

Neither the Public Service Commission nor the Puerto Rican courts nor the Circuit Court of Appeals found it objectionable that the names of all the partners should be mentioned; and if it could be considered (which we do not believe) that by naming the individual partners the individuals were made parties to the appeals, no party or Court made any objection;

If the use of the individual names was objectionable, it could only be so as a misnomer of the partnership entity; such a misnomer, which clearly described the entity, should be ignored,—and must be ignored where, as here, no appropriate motion has been made to correct the misnomer;

In the Circuit Court of Appeals as well as in the Puerto Rican courts, the court has been satisfied with the procedure. Each court has clearly indicated that the partnership entity was before it and this was expressly stated by the Circuit Court of Appeals after considering the point now raised.

Our adversary has made no motion in any court based upon the objection now made; and not having raised the point in some appropriate way at the beginning, in the District Court of San Juan, it is now too late. *Baltimore & Potomac R. R.* v. *Fifth Baptist Church*, 137 U. S. 568.

In short, although Russell & Company, Sucesores, S. en C., is a juridical entity and although for the purpose of determining the jurisdiction of Federal Courts based on diversity of citizenship the residence of the members is presumed to be that of the entity, as in the case of corporations (*Puerto Rico* v. *Russell & Co., et al.*, 288 U. S. 476), it is, nevertheless, a *partnership* entity and not a corporation, and must act not by a President or Board of Directors but by its partners. It has properly so acted throughout this litigation and has, by the procedure outlined above, consistently named the partnership entity as appellant and made it subject to the judgment of the Circuit Court of Appeals. How else, indeed, could this partnership entity have appeared or participated in the proceedings on appeal?

The Puerto Rican law is like the general American law —that the activities of partnerships, both general and limited, whether in court or outside, are directed and determined by partners themselves.

Without going fully into the Puerto Rican law, we may quote a few sections which we believe sufficiently show that the foregoing statement is correct. The citations refer to the Codes "Revised and published, under the provisions of Joint Resolution No. 18 of 1930, by the Legislative Joint Commission created by Act No. 50 of 1928."

> *Code of Commerce—Sec. 101.* "As a general rule, partnerships shall be established under one of the following forms:

1. As a regular general partnership where all the partners collectively and under a firm name bind themselves to share the same rights and obligations in such proportion as they may establish.

2. As special partnerships (*comanditaria*) where one or several partners contribute a specific amount of capital towards the common fund, to share in the results of the firm's transactions carried out exclusively by others under a collective name.

Partnerships may also be established in corporate form in accordance with the special law expressly authorizing it."

Code of Commerce—Sec. 123. "Limited copartnerships (*compañía en comandita*) must transact business under the name of all the members thereof, of several of them, or of one only, it being necessary to add in the latter two cases to the name or names given, the words 'and company' and in all cases the words 'limited copartnership' ('*sociedad en comandita*')."

Civil Code—Sec. 1556. "Partnership is a contract by which two or more persons bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among themselves."

Civil Code—Sec. 1586. "Should no agreement have been made with regard to the form of management, the following rules shall be observed:

1. All the partners shall be considered agents, and whatever any one of them may do by himself shall bind the partnership; but each one may oppose the act of the others before they may have produced any legal effect," etc.

Civil Code—Sec. 1591. "Partnership is dissolved:

1. When the term for which it was constituted expires.

2. When the thing is lost, or the business, for which it was constituted ends.

3. By the natural death, civil interdiction, or insolvency of any of the partners, and in the case prescribed in Section 1590.

4. By the will of any of the partners, subject to the provisions of Sections 1596 and 1598.

The partnerships referred to in Section 1561 are excepted from the provisions of numbers 3 and 4 of this section, in the cases in which they should exist, according to the Code of Commerce."

Code of Civil Procedure—Sec. 73. "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such case being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability."

It is certainly immaterial whether in a litigation like this the partnership entity should be designated as "Russell & Co., Sucrs., S. en C. by its partners, Horace Havemeyer, and others" or on the other hand, "Horace Havemeyer and others, as partners of the civil agricultural partnership, Russell & Co., Sucrs. S. en C." Words and the order of words are often important, but certainly not here.

Our adversary is apparently misled by the decision in *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, for he has per-

mitted himself no less than four times to refer to Russell & Company as a "corporate entity" or "corporate body" (Petition for Certiorari, p. 3, Brief in Support of Petition, pp. 25 and 30). His whole argument on parties seems based on the assumption that the partners of Russell & Company have no more control or importance or interest in the partnership than stockholders in a corporation (see Reply Brief, p. 9). The decision in the case cited gives no support for such a view. The decision is that under the Puerto Rican law the civil agricultural partnership of Russell & Company, Sucesores, S. en C., is a juridical entity and, "*as in* the case of a corporation, its domicile rather than that of its members determines citizenship for the purpose of Federal jurisdiction" (p. 479). "Only this and nothing more."

On the whole, we cannot improve upon the statement of the Circuit Court of Appeals, overruling, after full consideration, the contention regarding lack of parties made before that Court (R. 80):

> "It is urged by counsel for the appellees that the individual appellants as members of the Sociedad en Comandita, Russell & Company, a form of limited partnership organized under the Code of Commerce of Puerto Rico (1930), Sec. 95, have no standing here as appellants, since the Supreme Court in People of Puerto Rico *v.* Russell & Company et al., 288 U. S. 476, held that it was a juridical entity, at least, for the purpose of giving the insular courts jurisdiction, it having its domicile in Puerto Rico. It is of no importance whether the individual members of Russell & Company are parties to this appeal.
>
> The order to show cause was issued to 'Russell & Company, S en C, a limited partnership.' That

company is here. Throughout the entire proceedings it has been designated as a civil agricultural partnership, or a limited partnership, as it appears it is, Secs. 125, 156 of the Commercial Code, Civil Code (1930) Sec. 1590, and every order and judgment has been against it in that capacity. It is too late now to raise the point. Russell & Company as a Sociedad en Comandita, having been proceeded against and consented to be treated in the proceedings as a civil agricultural partnership, we think it may be considered bound by whatever judgment may be rendered."

POINT V.

Irrespective of the matters argued under Point I, the judgment of the Circuit Court of Appeals can and should be sustained on the independent and more fundamental ground—that on a proper construction of the pertinent acts of Congress, the Public Service Commission had no power or jurisdiction to make the order appealed from.

This point the Respondents have consistently urged from the beginning of the litigation (R. 3, 4, 5, 24, 26, 51, 68, 76, 86). By its opinion, the Circuit Court of Appeals, against our contention, upheld the jurisdiction of the Commission; it based its reversal of the Supreme Court judgment upon its decision—which we believe to be correct—that the Commission made an unreasonable order and thus overstepped its power. But this Court will not reverse a judgment correct in result even though it should find that the lower court based that judgment upon a wrong ground. The recent case of *Langnes* v. *Green,* 282 U. S. 531, 535, *et seq.,* is sufficient authority for the rule that in review on certiorari as well as upon writ of error, this court "must enter the judgment which should have been rendered by the court below on the record before it"; in that case the petitioner for certiorari urged that "since the decision below upon this point was against the respondent and he has not applied for certiorari, the point is not open here for consideration." The court, after reviewing the decisions, held that "the objection is without merit."

Moreover, in stating the "reasons for granting the writ," the petitioner seems to admit that the question of "the nature and extent of the powers of the Public Service

Commission of Puerto Rico is of very great interest and importance to the people of Puerto Rico and to the Insular Government'' (Petition, p. 2).

We shall show:

That the right to modify or repeal the Guanica franchise was reserved only to Congress;

Congress has never delegated it to the Puerto Rican Legislature or to the Public Service Commission and has not itself exercised it;

Even if it be considered that the power was reserved to the Executive Council it was not, on the dissolution of the Council, transferred by Congress to the Public Service Commission or to the Puerto Rican Legislature;

The Legislature did not have and could not grant that power to the Public Service Commission; and Section 60 of the Public Service Commission Act (Act No. 70, Puerto Rico Laws of 1917, Vol. II, p. 514), even if it could be construed as giving that power to the Commission, must be held invalid for lack of power in the Legislature to confer that power upon the Commission.

The power to amend, alter or repeal the Guanica franchise—as well as the power to modify and annul—was by the Organic Act of 1900 and the joint resolution and the franchise itself reserved solely to Congress and never vested in the Executive Council.

The original Organic Act (31 Stat. 77) passed on April 12, 1900, established a government for Puerto Rico. It created the Executive Council as the Upper House of the Puerto Rican Legislature. The general legislative functions were to be exercised by the Executive Council and the House of Representatives, but by Section 32 (31 Stat.

83) the power to grant franchises was vested solely in the Executive Council with the express reservation to Congress of the power to "annul or modify" the same.

> "Sec. 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

After the Organic Act was passed, Congress apparently felt that its reserved power to "annul or modify" franchises should appear upon the face of every franchise and it put that burden upon the Executive Council by Section 3 of a Joint Resolution of May 1, 1900 (31 Stat. 715), eighteen days after the passage of the Organic Act. It granted no power to the Executive Council to annul or modify or to amend, alter, or repeal, but it put the duty on the Council of including in every franchise, so that he who ran might read, an express provision that the franchise was subject to "amendment, alteration, or repeal." This provision, together with certain other provisions restricting the power and discretion of the Executive Council in the matter of

franchises, was included in the first sentence of Section 3 of the Joint Resolution (31 Stat. 716), which reads as follows:

> "Sec. 3. *That all franchises, privileges or concessions granted under section thirty-two of said Act shall provide that the same shall be subject to amendment, alteration, or repeal;* shall forbid the issue of stock or bonds, except in exchange for actual cash, or property at a fair valuation, equal in amount to the par value of the stock or bonds issued; shall forbid the declaring of stock or bond dividends; and, in case of public-service corporations, shall provide for the effective regulation of the charges thereof and for the purchase or taking by the public authorities of their property at a fair and reasonable valuation." (Italics ours.)

Such was the law when the Guanica franchise was granted on March 19, 1901. The franchise contains the following provisions (R. 13, 14):

> "XVIII. *In accordance with Section 3 of Public Resolution No. 23 approved May 1st, 1900,* it is hereby provided that the franchises, privileges and concessions hereby granted, shall be subject to amendment, alteration or repeal; and that issue of stock or bonds, except in exchange for actual cash, or property at a fair valuation, equal in amount to the par value of the stock or bonds issued, and the declaration of stock or bond dividends, are forbidden." (Italics ours.)
>
> "XX. The franchises, privileges, concessions and authority hereby granted, are granted in accordance with and subject to the provisions of the existing laws now in force in Porto Rico and all terms hereof shall be construed in accordance therewith."

It is significant that in creating the Executive Council by this, the first Organic Act, Congress showed clearly that its act of creation was complete—that no *further* power could be granted by the Puerto Rican legislature or assumed by the Executive Council (for instance, by reserving powers in grants of franchises); Section 18 of the Act provides for the constitution of the Executive Council and says that the Council "in addition to the legislative duties *hereinafter* imposed upon them as a body shall exercise such powers and perform such duties as are *hereinafter* provided for them respectively * * *." (Italics ours.) The maxim *expressio unius* applies here; in so stating these powers, Congress denies that others can be granted, except by Congress itself.

It is true that by Section 3 of the Joint Resolution of May 1, 1900 Congress provided that franchises granted under Section 32 of the Organic Act (authorizing grants by the Executive Council) shall "*in the case of public service corporations* * * * provide for the effective regulation of the charges thereof and for the purchase or taking by the public authorities of their property at a fair and reasonable valuation." If this be construed as giving to the Executive Council the privilege of naming itself as the "public authority" for taking property or regulating charges, this additional Congressional grant of power was limited to "the case of public service corporations." If, on the other hand, it be considered as authorizing the Puerto Rican Legislature to pass a Public Service Act for such regulation and taking of property, again it was limited to "public service corporations." On either construction, it is clear that Congress intended to strictly limit the powers of the Executive Council rather than to extend

those powers, or to authorize the Council to assume new powers, or to authorize the Puerto Rican Legislature to grant new powers.

Except possibly by this provision of the Joint Resolution, there cannot be found any act passed or authorized by Congress which conferred on the Executive Council any power additional to those provided by the act of its creation, Sections 18, 27 and 32 of the original Organic Act. Congress showed itself consistently as very niggardly in granting powers to the Council.

All this is relevant in the construction of the words of the Joint Resolution, repeated in the Guanica franchise, providing that franchises shall be "subject to amendment, alteration or repeal." In deciding whether this reserved power is merely in somewhat altered words the similar power reserved to Congress by Section 32 of the original Act, passed eighteen days before, or whether, on the other hand, the reservation provided by the Joint Resolution shall be construed to be a reservation of power to the Executive Council—thus adding to the powers granted by Section 32 to that Council—we submit that the first construction is the more reasonable, and that ordinary principles of construction and determination of Congressional intent makes the second construction impossible.

The Organic Act, the Joint Resolution and the franchise must be read together, and it clearly appears, we submit, that the power of "amendment, alteration or repeal" under the franchise, and the provision for "amendment, alteration or repeal" in the Joint Resolution of May 1, 1900, and the "power to annul or modify" franchises under Section 32 of the Organic Act, all refer to the same power and that power, however worded, was reserved to Congress—*and to Congress alone.*

This was clearly recognized in Puerto Rico when in 1911, ten years after the grant of the Guanica franchise, the Executive Council of Puerto Rico asked the able and distinguished Attorney General of Puerto Rico, Foster V. Brown, whether the Executive Council possessed the power to amend, alter and repeal the franchises granted by it. He advised by opinion dated May 22, 1911 (Opinions of the Attorney General of Porto Rico, Volume II, 1911, p. 286) that the Executive Council had no such power. He said—and we cannot improve upon his analysis and clarity of statement:

> "As I understand it, Congress by the organic act not only reserved to itself full and complete power to make such alterations and amendments to franchises granted in Porto Rico as come within the just scope of the legislative power, but thereby gave full notice of its intention to retain this power. Every franchise granted in Porto Rico contains that reservation of power to Congress" (p. 293).

And again he said:

> "This power to modify or annul franchises is a very extraordinary power, one that has been very rarely exercised. Congress and the state legislatures usually choose to leave the forfeiture of franchises and charters to the judicial branch of the Government. It seems to me inconceivable that Congress would expressly reserve to itself such an extraordinary power, and at the same time, by mere inference and implication, confer the same extraordinary power upon the Executive Council. It is, I say, inconceivable for another reason that this should be done, because it might at once introduce into the situation a conflict between the power of Congress and that of the Executive Council. I think when

> Congress reserved to itself in the organic act the broad power to modify or annul franchises, at its pleasure, and without cause, this was a withholding from, or denial to, the Executive Council of the right to exercise that extraordinary power'' (p. 295).

Again he says:

> ''Reading and construing the organic act and joint resolution together, I am of the opinion that Congress intended that every grant of franchise in Porto Rico should carry on its face notice to the grantee that it was subject to annulment or modification by Congress under the reserved power to repeal or modify as understood under the decisions of the Supreme Court of the United States * * *'' (p. 298).

The Attorney General summed up his conclusions as follows (p. 313):

> ''1. That Congress reserved to itself the right to modify or annul franchises, rights, privileges, and concessions of a public or quasi-public nature, and that this power may be exercised by Congress against the will and interest of the grantee.
>
> 2. That the Executive Council may not modify or annul franchises, rights, privileges, and concessions against the will of the grantee, but may declare a forfeiture for condition broken or failure to comply with the terms thereof when the Executive Council has, in granting the franchise, right, privilege, or concession, expressly reserved to itself the right to make this declaration of forfeiture on condition broken.
>
> 3. That the Executive Council may modify or amend franchises, rights, privileges, and concessions granted when the amendment or modification is in

furtherance of the original grant, and is made on application of the grantee thereof, or is accepted by the grantee of the franchise after being made by the Executive Council.

4. That the right reserved to Congress to modify or annul franchises, and the right which the Executive Council might reserve to itself in granting any franchise, does not interfere with the right of the judicial department of the government to declare forfeited or annulled any franchise granted by the Executive Council for non-user, mis-user, or abuse, or condition broken, this power being inherent in the courts."

We have shown, we believe, that the power of amendment, alteration or repeal reserved by the Guanica franchise was reserved not to the Executive Council but to Congress and to Congress alone. Congress has admittedly never exercised that power, and at least up to the time of the passage of the Organic Act of 1917 (39 Stat. 951), Congress has never conferred that power upon the Public Service Commission or authorized the granting of that power by the Puerto Rican legislature.

What then of the Organic Act of 1917?

By the Organic Act of 1917, Congress did not confer upon the Public Service Commission created by that Act any power or jurisdiction to exercise the power of amendment, alteration or repeal reserved by the Guanica franchise. Section 38, the only section which could be applicable, confers upon the Commission only "the executive functions relating to public service corporations heretofore conferred by law upon the executive council"; and the reserved power in the Guanica franchise does not relate to a Public Service corporation nor is it a function "conferred by law upon the executive council."

This, we believe, can be clearly demonstrated.

In 1917 Congress passed the new Organic Act of that year. That act ended the existence of the Executive Council, and in its place as the upper body of the bi-cameral legislature it created a senate. It created a public service commission with a full statement of its constitution, its purposes and powers by Section 38, and by Sections 38 and 39 it repeats the provisions of the original Organic Act and the Joint Resolution regarding franchises. The most important parts of those two sections are as follows (39 Stat. 964):

> "Section 38. That all grants of franchises, rights, and privileges of a public or quasi-public nature shall be made by a public service commission, consisting of the heads of executive departments, the auditor, and two commissioners to be elected by the qualified voters at the first general election to be held under this Act, and at each subsequent general election thereafter * * *. *The said commission is also empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council.* Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor, and shall be reported to Congress, which hereby reserves the power to annul or modify the same. (Italics ours.)
>
> * * * * * *
>
> The Legislative Assembly of Porto Rico is hereby authorized to enact laws relating to the regulation of the rates, tariffs, and service of public carriers by rail in Porto Rico, and the Public-Service Commission hereby created shall have power to enforce such laws under appropriate regulation.
>
> Section 39. That all grants of franchises and privileges under the section last preceding shall pro-

vide that the same shall be subject to amendment, alteration, or repeal, and shall forbid the issue of stocks or bonds except in exchange for actual cash or property at a fair valuation to be determined by the public-service commission equal in amount to the par value of the stocks or bonds issued, and shall forbid the declaring of stock or bond dividends, and in the case of public-service corporations shall provide for the effective regulation of charges thereof and for the purchase or taking of their property by the authorities at a fair and reasonable valuation."

The above sections did not in anywise change the effect of the original Organic Act of 1900, except that Sections 38 and 39 bring close together the provision clearly reserving to Congress the right to annul or modify and the provision regarding the reserved power of amendment, alteration, or repeal, which provisions were in the original legislation separated by a period of eighteen days; this strengthens our contention that the two provisions mean the same. To Congress alone was reserved the power to annul or modify franchises granted by the Public Service Commission. The Public Service Commission was not granted the right to amend, alter or repeal franchises granted by them, or franchises previously granted by the Executive Council.

Section 38 empowers the Public Service Commission to discharge only "*executive*" functions, and only "*executive functions relating to public-service corporations*", and only such executive functions relating to public service corporations which were "*heretofore conferred by law upon the executive council.*"

This provision certainly did not transfer to the Public Service Commission the function of modifying or repeal-

ing private franchises, but distinctly the contrary. With the whole field before it, Congress chose to confine its transfer of executive functions to those "relating to public service corporations" and the old rule applies, *expressio unius est exclusio alterius.*

Certainly Russell & Company is not, and the Guanica Land Company, the original franchise holder, was not, "a public service corporation", and the power reserved in our franchise was not a power relating to a public service corporation, and the new Public Service Commission was not by Section 38 empowered by Congress to exercise that power.

There should be no confusion on this point, and there can be no doubt.

The petitioner has admitted that Russell & Company is not a public service corporation and that our franchise is essentially a private franchise.

In its order to show cause (R. 17) the Commission says:

> "IV. That the grants, privileges and rights enjoyed by virtue of this franchise are:
>
> (a) The use of water for purposes of irrigation in private lands.
>
> (b) The construction of a private wharf in the harbor of Guanica; and
>
> (c) The construction and operation of a private railway in Guanica.
>
> That said grants, privileges and rights are of a purely private and personal character and that from the wording of the said franchise it does not appear that at any time a service of a public nature is ever rendered."

The President's report, made a part of the cancellation order (R. 30) says:

> "That all these grants, as said before, have a private character."

In his brief before the District Court, counsel for the Public Service Commission, as quoted in the opinion of the District Court (R. 51), asserted:

> "That the appellants, who are members of the partnership Russell & Co., Sucrs., S. en C. *are not a public service corporation* in accordance with the provisions of Section two of Act No. 70 of 1917, nor in accordance with par. XXI of the franchise, which literally quoted reads thus:
>
> " 'Nothing herein in this grant contained, shall be construed to give the said Company, or its successors, or to the assigns in whole or in part of any of the rights and privileges herein granted, the right, directly or indirectly, with or without compensation in money or otherwise, to use, hire, lease, sell or otherwise dispose of the waters of said lake or any part thereof for the purpose of irrigating any lands other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold.' " (Italics ours.)

The District Court opinion approved that statement (R. 51).

These admissions are correct.

Baldwin's Century Edition of Bouvier's Law Dictionary (p. 1002) states that "public service corporations" is "an-

other name for quasi-public corporations," and at page 1009, "A quasi-public corporation is one constituted of private persons to engage in a business, public in its nature, and *where it must serve all who apply.*" (Italics ours.)

14 Corpus Juris, 91, note 34, says:

> "A 'public service corporation' may be defined as a corporation which, although organized and controlled by private persons and for private profit, is for the purpose of serving the public generally * * *."

The Organic Act of 1917 shows that in Section 38 the words are used in the usual sense. Thus, in the following Section 39 of the Organic Act, Congress says that franchises granted by the Public Service Commission "in the case of public-service corporations shall provide for the effective regulation of charges thereof", showing that in the conception of Congress, public-service corporations are corporations which give public service for a charge.

That our franchise does not require or permit the franchise holders to give any public service whatever, is clear.

The title (R. 8) shows that the use of waters is "for Purposes of Irrigation of its Lands" and that the railway is private. Section II (R. 9) as to waters, shows we can use only sufficient waters "for the proper irrigation of the lands now or hereafter owned or leased by the said Company or by its successors or assigns, or any of them." Section VI (R. 10) provides that the railway

> "shall be used for the transportation of cattle, crops, and other goods and effects owned by the said

> company, or its successors or assigns and of its and their agents and employees; *provided, that nothing herein in this clause contained shall be held or construed to give said Company, its successors or assigns the right to transport the crops, goods and effects of any other person, firm or corporation for hire.*" (Italics ours.)

Again, Section IX (R. 10) says that the franchise gives no right to permit the use of the wharf or dock by vessels "of any other person, firm or corporation whatever, for hire or otherwise, for any purpose," nor to give the "right for hire or otherwise, to receive or discharge in its own vessels or the vessels of any other person, firm or corporation, goods, chattels and effects belonging to any other person, firm or corporation."

Again, Section XXI (R. 14) provides that the franchise shall not give

> "the right, directly or indirectly, with or without compensation in money or otherwise, to use, hire, lease, sell or otherwise dispose of the waters of said lake or any part thereof for the purpose of irrigating any lands other than the lands actually owned by the said Company, its successors or assigns, on which, in good faith and by means of its own paid laborers, the said Company, its successors and assigns, may be raising crops of which it or they shall be the sole proprietor until harvested and sold."

Again, by Section XXII (R. 14) the Executive Council reserves the right to declare the franchise holder "a common carrier with respect to said railroad and wharf and to extend the use of said railroad and wharf to the general public upon such terms and conditions as to rates and

tariffs as the Executive Council may from time to time establish."

Thus, carefully, explicitly and in several different ways, the franchise itself shows that it is private and that (unless the Executive Council should declare it a common carrier, which has not been done) the franchise holders have no right under the franchise to serve the public in any way. How could this be made more clear?

Russell & Company is not a public service corporation within the definitions of the "Act concerning the regulation of public service corporations in Porto Rico (Laws of Porto Rico, 1908, p. 97).

This we show at page 78 below when we discuss that act and its definitions, scope and purpose.

It is interesting, though hardly relevant, that Russell & Company is not a public service company within the definitions of Section 2 of the Public Service Act of Porto Rico (Act No. 70, Laws of Porto Rico, 1917, Vol. II, p. 432).

The definitions of that Act, which became effective on December 6, 1917, cannot be read to include our franchise holders. Section 2 (a) and (c) reads as follows:

> "For the purposes of this Act, public-service companies shall be such natural persons or bodies corporate as may engage in Porto Rico in any of the following pursuits or businesses:
>
> (a) Transportation of persons or freight using in whole or in part marine, fluvial or land routes.
>
> (c) Wharves of all kinds and dry-docks."

Paragraph (h) of Section 2 clearly shows that the holding of a private water franchise is not within the definition of public service company; it provides that

> "None of the provisions of this Act shall apply * * * to the furnishing or distribution of water * * * by a producer who is not otherwise a public-service company, for the sole use of such producer, or for the use of tenants of such producer, and not for the sale to others."

As above shown, the Guanica franchise does not permit the franchise holders to engage in transportation or wharf operation as a pursuit or business, and the Commission admits (R. 17) that "it does not appear that at any time a service of a public nature is ever rendered." Moreover, the provisions of Section 3 of the Public Service Act requiring public service companies to furnish safe service and facilities, to permit service at just and reasonable rates, to make repairs necessary for the safety of its patrons and the public and to fix proper tariffs, shows that whatever may be the wording of the definitions, the Legislature meant to include in the term "public-service companies" only companies engaged in giving public service.

So it is clear that the right to exercise the power of amendment and repeal reserved in the Guanica franchise was not a "function relating to a public service corporation."

Nor was it a function "heretofore conferred by law upon the executive council"; for that reason again that power was not conferred by Section 38 upon the new Public Service Commission.

We have shown above, we believe, that Attorney General Brown was right in advising that under the original

Organic Act and Joint Resolution the right to exercise the reserved power in such franchises as ours had not been "conferred by law upon the executive council" and was vested not in the Executive Council, but in Congress.

What, then, did Congress have in mind in speaking of "executive functions relating to public-service corporations heretofore conferred by law upon the executive council"?

The answer was suggested by the opinion in the Circuit Court of Appeals and is easy. That court says (R. 88):

> "While it (this provision of Section 38) may have related to the executive functions impliedly conferred on the Executive Council by the Joint Resolution of 1900, it may well have referred to the executive functions conferred on the Executive Council relating to public service corporations under the Act of March 12, 1908 entitled 'An Act concerning the Regulation of Public Service Corporations in Porto Rico' ".

If by Section 38 Congress conferred on the Executive Council "the executive functions impliedly conferred upon the Executive Council by the Joint Resolution", it thereby conferred merely the right *"in the case of public service corporations"* to "provide for the effective regulation of the charges thereof and for the purchase or taking by the public authorities of their property at a fair and reasonable valuation"—only this and nothing more. This was the wording of the Joint Resolution referred to. (See our discussion of that provision at pages 62 to 68 above.) If this be the power conferred on the Executive Council, that power can by no possible construction include the power reserved in the private franchise of a franchise

holder who is in no sense a public service corporation, to alter, amend or repeal that franchise.

If, on the other hand, the phrase referred "to the executive functions conferred on the executive council relating to public service corporations" under the Puerto Rican Act of 1908 (Laws of Porto Rico, 1908, p. 97) it is perfectly clear that such functions did not and could not include the right of exercising the power of amendment, alteration or repeal reserved by our private franchise. That Act is entitled "An act concerning the regulation of public service corporations in Porto Rico"; Section 1 provides that it "shall apply to all public service corporations as herein described"—and obviously to no other corporations; Section 2 defines the term "public service corporation" and shows that it applies *only* to public service corporations in the ordinary acceptation of the phrase; and the entire Act merely empowers the Executive Council to regulate the tariffs, service, etc. of public service corporations and gives it the necessary powers incidental to enforce such regulations as it may make under the provisions of the Act. That the purpose of this Act is as stated is shown by the following extract from Section 3 of Act No. 31 of March 9, 1911 (Laws of Porto Rico, 1911, p. 116) amending the 1908 Act:

> "• • • it being the intention of this act to confer on the Executive Council of Porto Rico the right and power to secure to The People of Porto Rico a good public service from all public service corporations operating in Porto Rico; and full and plenary power is hereby given to the said Executive Council to inquire into the kind, and character, of the service being furnished in Porto Rico by any public service corporation operating therein, and to make

any and all orders which shall, in its discretion, tend to secure a good and proper service to the public from such public service corporations."

Neither by express word or implication do either of these statutes give to the Executive Council any power to amend, repeal, cancel or forfeit any franchise or right thereunder, whether the franchise be public or private, new or old, or connected with public service or not. How, then, can it be argued that the power to amend or repeal our pre-existing private franchise was conferred by these statutes upon the Executive Council?

Thus, whether by Section 38 Congress intended to confer on the new Public Service Commission the executive functions impliedly conferred by the Joint Resolution or those relating to public service corporations conferred under the Puerto Rican Act of 1908; in neither case can it be held that the power so conferred by Congress included the right to exercise the power reserved by our private franchise.

By this analysis and review of the new Organic Act of 1917, we believe that we have proved that Congress did not by that act confer upon the new Public Service Commission any right to exercise the power reserved by our franchise.

But even if Congress never itself conferred on the new Public Service Commission any right to amend, alter or repeal our private franchise, nevertheless, it is said, the Puerto Rican Legislature did by Section 60 of the Public Service Act passed by it in 1917 grant to the new Public Service Commission the right to exercise that reserved power.

There is a two-fold answer. First, Section 60 was not intended to apply to private franchises, and second, if so

intended it was to that extent invalid because of lack of power of the Legislature to enact it.

Section 60 (Laws of Puerto Rico, 1917, Vol. II, p. 514) reads as follows:

> "Section 60.—*Violation of existing franchises.*—Nothing in this article shall be construed to violate the provisions of any franchise that may have been granted by the Executive Council and is now in force; *Provided, however,* that the commission shall have the power to alter, amend, modify or repeal such franchises, and shall exercise all the rights and powers reserved to the Executive Council by any such franchise or privilege, or by any law."

Section 2 of the Public Service Act shows that neither this Section nor any other provision of the Act was intended to apply to a private water franchise or the holder of such a franchise.

Section 2 specifies the persons or bodies corporate included as public service companies for the purposes of the act, and it expressly provides (Laws of Puerto Rico, 1917, Vol. II, pp. 432, 434):

> "that none of the provisions of this Act shall apply to the generation, transmission or distribution of electricity; to the manufacture or distribution of gas; *to the furnishing or distribution of water;* or to the production, delivery or furnishing of steam or any other substance for heat or power, *by a producer, who is not otherwise a public service company, for the sole use of such producer, or for the use of tenants of such producer, and not for the sale to others.*" **(Italics ours.)**

Sections II and XXI (R. 9, 14) of the franchise show clearly that the holder of the water part of the franchise can use the water only for his own use or for the use of other assignees of the Guanica Land Company. Accordingly, Section 60 can have no application to Russell & Company or to the water part of the franchise held by it, and by that token Section 60 was not intended to confer and does not confer upon the Public Service Commission any right to amend, alter or repeal the water part of the Guanica franchise.

If Section 60 be read as conferring on the Public Service Commission the power to amend or repeal the private Guanica franchise, it must be ignored as invalid because the Puerto Rican Legislature had no possible power to enact a section conferring that right.

The Puerto Rican Legislature can exercise only powers granted by Congress; and prior to 1927 Congress nowhere expressly or impliedly conferred on the Legislature the power to make any such grant to the Public Service Commission.

On the contrary, Congress in effect forbade the granting of such a power, when by Sections 38 and 39 of the new Organic Act of 1917 it created a Public Service Commission and granted to it and by carefully chosen and clear words outlined its powers. In attempting to enlarge those powers and in a Public Service Act to go outside of all questions of public service and confer upon a Public Service Commission created by Congress powers over a private franchise, and thus to change the character of the Commission fixed by Congress, the Legislature assumed a power which it did not have. The last sentence of Sec-

tion 38 gave to the Legislature express but strictly limited authority in the field of public service but the limitations of this authorization negative any intention by Congress to allow the Legislature to confer on the Commission powers over a private franchise. This sentence reads as follows:

> "The Legislative Assembly of Porto Rico is hereby authorized to enact laws relating to the regulation of the rates, tariffs and service of public carriers by rail in Porto Rico, and the Public Service Commission hereby created shall have power to enforce such laws under appropriate regulation."

We cannot insist too strongly that Section 60 in so far as it applies to private franchises does not belong in a Public Service Law and is not justified or validated by authority to pass a Public Service Law; and, moreover, that it goes far beyond Sections 38 and 39 of the new Organic Act of 1917 and is inconsistent therewith. If the section, appearing as it does in a Public Service Law, is construed to apply to existing private franchises, it is in so far invalid.

It is interesting that in 1927, long after Section 60 was enacted, someone realized that the Puerto Rican Legislature might wish to confer additional powers upon the Public Service Commission and that under the Organic Act of 1917 legislation (like Section 60) conferring such powers would be invalid. At any rate, on March 4, 1927, Congress (44 Stat. 1420, §6) amended Section 38 of the Organic Act of 1917 so that the part in question read as follows:

> "* * * The said commission is empowered and directed to discharge all the executive functions relating to public service corporations heretofore conferred by law upon the executive council *and such*

additional duties and functions as may be conferred upon said commission by the legislature. Franchises, rights, and privileges granted by the said commission shall not be effective until approved by the governor and shall be reported to Congress, which hereby reserves power to annul or modify the same." (Italics show the amendment.)

Thus, in 1927 Congress provided that the Puerto Rican Legislature might *thereafter* confer—and the Public Service Commission created by Congress might validly exercise—duties and functions "*additional*" to "the executive functions relating to public-service corporations heretofore conferred by law upon the executive council." Could Congress show more clearly that it considered that under the original form of the section and until 1927 the functions of the Commission were limited to those relating to public service corporations, etc., and further, that the Legislature until the amendment of 1927 could confer no duties and functions upon the Commission "additional" to those relating to public service corporations?

It may be that after March 4, 1927 the Puerto Rican Legislature had the power to pass a new section which would confer on the Public Service Commission rights over old private franchises. But when Section 60 of the Public Service Act became effective on December 6, 1917, the Legislature had no such power or authority, and so far as concerns the Guanica franchise, Section 60 must be ignored.

Whether the reserved power is to be considered executive or legislative, the Legislature had no power to confer it upon the Public Service Commission.

Whichever horn of this dilemma may be grasped, it is clear that wherever the reserved power vested upon the

abolition of the Executive Council by Congress, there it still remains; Section 60 was ineffective to transfer it to the Public Service Commission, even if the Legislature so intended.

The Organic Act of 1917 makes a clear division of governmental powers in Puerto Rico. Sec. 25 (39 Stat. 958) provides that

> "All local legislative powers in Porto Rico, except as otherwise provided, shall be vested in a legislature," etc.

and Sec. 40 (39 Stat. 965) provides that

> "The judicial power shall be vested in the courts and tribunals of Porto Rico now established and in operation under and by virtue of existing laws."

And Secs. 12 ff. (39 Stat. 955, ff.) provide for the vesting of executive power in the Governor and other officials and Secs. 37 and 53 (39 Stat. 964, 968) provide that new executive departments shall not be created by the Legislature and that bureaus or offices shall be transferred and assigned by the Governor, with the approval of the Senate.

If it be considered that the reserved power to cancel a part of the Guanica franchise was a *legislative* power, and further, that that power was originally vested in the Executive Council, and further, that upon the abolition of the Council it passed to the Puerto Rican Legislature—that legislative power could be exercised by the Legislature itself but could not be by it delegated to the Commission, broadly and absolutely, without fixing clear standards, etc.; the broad language of Section 60 would not constitute a valid delegation of such a legislative power.

If, on the other hand, it be considered that that reserved power was an *executive* power, originally lodged in the Executive Council, that power on the abolition of the Executive Council on March 2, 1917, must, in the absence of any Congressional provision to the contrary, have passed to the executive branch of the Puerto Rican government; under the division of powers established by the Organic Act of 1917 between the executive, legislative and judicial branches, the Legislature could certainly not take that executive power away from the Governor or the Governor and Council and transfer it to the Public Service Commission. The *Springer* case, 277 U. S. 189, is an interesting case coming from the Philippine Islands and discussing the question of use or delegation of executive powers by the Legislature.

It is also said that Section 60 is authorized by the general grant to the Puerto Rican legislature of legislative power by Sections 25 and 37 of the Organic Act of 1917 and further that the Public Service Act, including Section 60, was duly reported to Congress and never annulled by Congress.

It is sufficient to say that the entire Organic Act must be read together and the extent of general legislative powers granted in Sections 25 and 37 is limited by Section 38, by which Congress itself decides what the new Public Service Commission shall be and to that extent limits the legislative powers.

As to the failure of Congress to annul the Public Service Act when submitted to it, we need only quote two decisions.

In *Berryman* v. *Whitman College*, 222 U. S. 334, 353, Mr. Chief Justice White said:

> "The only principal contention remaining unnoticed is the alleged acquiescence of Congress in the grant of exemption resulting from its failure to disapprove the act of 1883. Rev. Stat., §1850. The foundation, however, upon which the contention rests has been decided to be without merit. *Clayton* v. *Utah*, 132 U. S. 632, 642."

In *Clayton* v. *Utah Territory*, 132 U. S. 632, 642, the Court held:

> "It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of Congress reserved in the organic acts of the Territories to annul the acts of their legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of Congress under which they were created."

Thus, we submit, the cancellation order of the Public Service Commission was made without power or authority either from Congress or from the Puerto Rican legislature and was consequently void, and the judgment of the Circuit Court of Appeals should be affirmed on that ground, if no other.

Conclusion.

The judgment of the Circuit Court of Appeals for the First Circuit should be affirmed.

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FEDERAL RADIO COMMISSION
v.
NELSON BROTHERS BOND & MORTGAGE CO. (Station WIBO).

(289 U. S. 266)

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 657. Argued April 11, 1933.—Decided May 8, 1933.

* * * * * * *

CERTIORARI, 288 U. S. 597, to review the reversal of an order of the Federal Radio Commission licensing a broadcasting station in Indiana to operate on a radio frequency theretofore assigned to and enjoyed by two stations in Illinois, and terminating the licenses of those stations.

* * * * * * *

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The Johnson-Kennedy Radio Corporation, owning Station WJKS at Gary, Indiana, applied to the Federal Radio Commission for modification of license so as to permit operation, with unlimited time, on the frequency of 560 kc. then assigned for the use of Station WIBO, owned by Nelson Brothers Bond & Mortgage Company, and Station WPCC, owned by the North Shore Church, both of Chicago, Illinois. These owners appeared before the chief examiner, who, after taking voluminous testimony, recommended that the application be denied. The applicant filed exceptions and, on consideration of the evidence, the Commission granted the application and directed a modified license to issue to the applicant authorizing the operation of Station WJKS on the frequency of 560 kc. and terminating the existing licenses theretofore issued for

Stations WIBO and WPCC. On appeal, the Court of Appeals of the District of Columbia reversed the Commission's decision upon the ground that it was "in a legal sense arbitrary and capricious." 61 App. D. C. 315; 62 F. (2d) 854. This Court granted certiorari.

* * * * * *

First. Respondents challenge the jurisdiction of this Court. They insist that the decision of the Court of Appeals is not a 'judicial judgment'; that, for the purpose of the appeal to it, the Court of Appeals is merely a part of the machinery of the Radio Commission and that the decision of the Court is an administrative decision. Respondents further insist that if this Court examines the record, its decision "would not be a judgment, or permit of a judgment to be made in any lower court, but would permit only consummation of the administrative function of issuing or withholding a permit to operate the station."

Under § 16 of the Radio Act of 1927, the Court of Appeals, on appeal from decisions of the Radio Commission, was directed to "hear, review, and determine the appeal" upon the record made before the Commission, and upon such additional evidence as the Court might receive, and was empowered to "alter or revise the decision appealed from and enter such judgment as to it may seem just." 44 Stat. 1169. This provision made the Court "a superior and revising agency" in the administrative field and consequently its decision was not a judicial judgment reviewable by this Court. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 467. The province of the Court of Appeals was found to be substantially the same as that which it had, until recently, on appeals from administrative decisions of the Commissioner of Patents. While the Congress can confer upon the courts of the District of Columbia such administrative authority, this Court cannot be invested with jurisdiction of that character whether for the purpose of review or otherwise. It cannot

give decisions which are merely advisory, nor can it exercise functions which are essentially legislative or administrative. *Id.*, pp. 468, 469. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 442-444; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 700.

In the light of the decision in the *General Electric* case, *supra*, the Congress, by the Act of July 1, 1930, c. 788, amended § 16 of the Radio Act of 1927 so as to limit the review by the Court of Appeals. 46 Stat. 844; 47 U. S. C. 96.[2] That review is now expressly limited to "questions of law" and it is provided "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious." This limitation is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the

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[2] By this amendment, § 16 (d) reads as follows:

"At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of title 28 of the Judicial Code by appellant, by the commission, or by any interested party intervening in the appeal." 46 Stat. 844; 47 U.S.C. 96.

In reporting this amendment, the Committee on the Merchant Marine and Fisheries of the House of Representatives stated: "The purpose of the amendment is to clarify the procedure on appeal to the court from decisions of the Federal Radio Commission, to more clearly define the scope of the subject matter of such appeals, and to insure a review of the decision of the Court of Appeals of the District of Columbia by the Supreme Court." H.R.Rep. No. 1665, 71st Cong., 2d Sess., p. 2.

Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547, 548; *New England Divisions Case*, 261 U. S. 184,

203, 204; *Keller* v. *Potomac Electric Power Co., supra; Chicago Junction Case,* 264 U. S. 258, 263, 265; *Silberschein* v. *United States,* 266 U. S. 221, 225; *Ma-King Products Co.* v. *Blair,* 271 U. S. 479, 483; *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 30; *Tagg Bros.* v. *United States,* 280 U. S. 420, 442; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 654; *Crowell* v. *Benson,* 285 U. S. 22, 49, 50.

If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not "be misled by a name, but look to the substance and intent of the proceeding." *United States* v. *Ritchie,* 17 How. 525, 534; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 479; *Federal Trade Commission* v. *Eastman Co.,* 274 U. S. 619, 623; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 722-724. "It is not important," we said in *Old Colony Trust Co.* v. *Commissioner, supra,* "whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law." Nor is it necessary that the proceeding to be judicial should be one entirely *de novo.* When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power. The provision that, in case the Court reverses the decision of the Com-

mission, "it shall remand the case to the Commission to carry out the judgment of the Court" means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous. *Osborn* v. *United States Bank*, 9 Wheat. 738, 819; *In re Pacific Railway Commission*, 32 Fed. 241, 255; *Federal Trade Commission* v. *Klesner, supra; Federal Trade Commission* v. *Raladam Co., supra; Old Colony Trust Co.* v. *Commissioner, supra.*

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We find no ground for denying effect to the Commission's action. The judgment of the Court of Appeals is reversed and the cause is remanded with direction to affirm the decision of the Commission.

Reversed.